United States Court of Appeals

for the Second Circuit



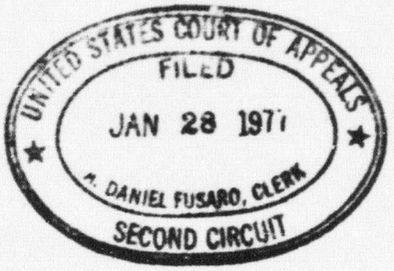
APPELLANT'S APPENDIX

76-7540

TO BE ARGUED BY
KENNETH HELLER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



Docket No. T-6665

76 Civil 3050

B P/S

S. M. PIRES and VIRGINIA PIRES, his wife

Plaintiff-Appellant,

-against-

CHICAGO, ROCK ISLAND AND PACIFC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants-Appellees.

On Appeal From The United States District Court for the Southern District of N.Y.

APPENDIX FOR PLAINTIFF-APPELLANT

KENNETH HELLER, ESQ.
Attorney for Plaintiff-Appellant
277 Broadway
New York, New York 10007
WO 2-6085

PAGINATION AS IN ORIGINAL COPY

APPENDIX

A. Original Petition of Plaintiff in Galveston

B. Texas Court Order Denying S.M. Pires Pro Se Motion to Dismiss

C. Summons and Complaint

D. Amended Complaint

E. Notice of Cross Motion to Remand and/or Dismissal Without Prejudice

F. Plaintiff's Memorandum of Law in Support of Cross Motion to Remand

G. Supplemental Memo in Support of Plaintiff's Position to Remand the action to the Supreme Court, New York County and in Opposition to Defendant's Motion for Transfer to Another Forum

H. Affidavit in Opposition to Defendant's Motion to Transfer

I. Affidavit - S.M. Pires

J. Plaintiff's Memorandum of Law in Support of Affidavit in Opposition to Defendant's Motion to Transfer

K. Supplemental Memorandum of Law in Support of Motion to Stay the Transfer of this Action to Texas

L. Affidavit in Opposition

M. Reply Affidavit

N. Order to Show Cause

O. Memorandum of Law in Support of Plaintiff's Order to Show Cause

P. Supplemental Affidavit in Support of Order to Show Cause

Q. Gagliardi's Memorandum Decision

R. Notice of Appeal

BEST COPY AVAILABLE

FOR THE NORTHERN DIVISION OF GALVESTON COUNTY

STARKEISER DA SILVA MATOS PIPES §
§
§
§ C. A. NO. 75-6-173
vs. §
§
THE CITY OF GALVESTON, ACTING § BY AND THROUGH THE BOARD § OF TRUSTEES OF THE GALVESTON § WHARVES §

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW STARKEISER DA SILVA MATOS PIPES, hereinafter referred to as Plaintiff, complaining of THE GALVESTON WHARVES, hereinafter sometimes referred to as Defendant, and for cause of action would respectfully show unto the Court:

I.

Your Plaintiff is a Brazilian citizen residing in Rio De Janeiro, Brazil.

II.

Upon information and belief, at all times hereinafter mentioned and at all times material hereto, the City of Galveston, acting by and through its Board of Trustees of the Galveston Wharves was and is an organization conducting railroad and railyard operations in the City of Galveston, Galveston County, Texas.

III.

Jurisdiction is founded upon diversity of citizenship and that the amount of claim is in excess of Ten Thousand Dollars ($10,000.00).

IV.

The Defendant is an organization created and existing by virtue of the laws of the City of Galveston, Texas, and

commerce with regard to such business as has been transacted by your Plaintiff's knowledge within the State of Texas. The Defendant, The Galveston Wharves, is the owner and/or operator of a railyard and as such marshals railroad cars by use of its own locomotives and railroad tracks within the City of Galveston, Texas, and particularly in connection with the shipping activity of the Port of Galveston, Texas. One of such locomotives was pulling or pushing railroad cars at the intersection of 37th Street with the railroad tracks, when one of such cars being propelled by the Defendant's locomotive, struck and severely injured Plaintiff, herein. Said Defendant may be served by serving Mr. C. S. Devoy, the Executive Director of the Galveston Wharves at 802 Rosenberg, Galveston, Galveston County, Texas, where service of process may be had, and by serving the Mayor of Galveston, Mr. R. A. Apffel at City Hall of Galveston, or at his business office, Suite 808, Sealy & Smith Professional Building, 200 University Boulevard, Galveston, Texas.

V.

December 11, 1975, Plaintiff was a seaman employed on the M/V FRONTELESTE which had called at the Port of Galveston to load grain. The M/V FRONTELESTE had berthed at Pier 39 to await her shift to the grain elevator for loading. Plaintiff, with a group of his shipmates was walking south on 37th Street to make a telephone call to his wife and child in Rio De Janeiro, Brazil. As he arrived at the intersection of 37th Street with the railroad tracks, he found the street blocked by railroad cars sitting at a standstill across the road. There were no flashing lights or warnings of any type. Plaintiff, in order to get into town, had to go around the end of the railroad cars. As plaintiff stepped around the end of the car, the railroad car suddenly moved without warning and Plaintiff was caught under the wheels and

Plaintiff would show that his injuries were caused by the negligence of the Defendant, its agents, servants and/or employees and such negligence was the proximate cause of the injuries suffered by Plaintiff herein.

VI.

Pleading further and in the alternative, Plaintiff would show that the railroad car which struck and injured him was at all times material hereto within the possession and control of the Defendant and its railroad activities, and that the occurrence complained of herein, was a type that normally does not occur in the absence of negligence. Because of the foregoing, Plaintiff would invoke the doctrine of Res Ipsa Loquitor.

VII.

Pleading further and in the alternative, Plaintiff would show that his injury was caused by the negligence in whole or in part as a result of the Defendant, violating Federal and/or State or local statutes and rules and regulations thereunder, and that these violations amounted to negligence per se and were a proximate cause of the Plaintiff's injuries.

VIII.

Upon trial of this cause, it will be shown that Plaintiff was caused to sustain injuries and damages resulting in the amputation of his right leg, and other bodily injuries, as a proximate result of the occurrence described herein, and Plaintiff will respectfully request the finder of fact to determine the amount of loss he has incurred in the past and will incur in the future, not only from a financial standpoint, but also in terms of good health and freedom from pain and worry. There are certain elements of damages, provided by law, that Plaintiff is entitled to have the finder of fact in this case separately consider to determine the sum of money for each element that will fairly and reasonably

compensate Plaintiff for the injuries and damages and losses incurred in the past and to be incurred in the future. From the date of the accident in question until the time of the trial of this case, those elements of damages to be considered separately and individually for the purpose of determining the sum of money that will fairly and reasonably compensate Plaintiff for each element are as follows:

(1) The physical pain that Plaintiff has suffered from the date of the accident in question up to the time of trial.

(2) The mental anguish that Plaintiff has suffered from the date of the accident in question up to the time of trial.

(3) The amount of reasonable medical expenses necessarily incurred in the treatment of Plaintiff's injuries from the date of the accident in question up to the time of trial.

(4) The loss of any earnings sustained by Plaintiff from the date of the accident in question up to the time of trial.

From the time of trial of this case, the elements of damages to be separately considered which Plaintiff will sustain in the future beyond the trial are each of the following elements that are shown by a preponderance of the evidence upon trial of this case:

(1) The physical pain that Plaintiff will suffer in the future beyond the time of trial.

(2) The mental anguish that Plaintiff will suffer in the future beyond the time of trial.

(3) The reasonable value of medical expenses that will necessarily be incurred in the treatment of Plaintiff's injuries in the future beyond the time of trial.

(4) The loss or reduction in Plaintiff's earnings or earning capacity in the future caused by the injuries sustained in the collision in question.

Because of all of the above and foregoing, your Plaintiff has been damaged, in at least the sum of EIGHT HUNDRED SEVENTY-FIVE THOUSAND DOLLARS

($875,000.00), for which Plaintiff now brings suit.

WHEREFORE, PREMISES CONSIDERED, your Plaintiff prays that Defendants be cited to appear and answer herein and that upon final trial that Plaintiff recover the damages as specified above from the Defendants, both jointly and severally, including costs of Court, interest at the legal rate, and have such other and further relief, both general and special, at law and in equity, to which Plaintiff may be entitled under the facts and circumstances.

Robert S. DeLange

Robert S. De Lange
Attorney-in-Charge for Plaintiff
205 Cotton Exchange Building
Galveston, Texas 77550
(713) 763-1623

OF COUNSEL:
ROYSTON, RAYZOR, COOK & VICKERY

Plaintiff hereby respectfully demands a trial by jury.

PERSONAL INJURY TO STARKEISER DA SILVA MATOS PIRES

In accordance with the Charter of the City of Galveston, we as attorneys for STARKEISER DA SILVA MATOS PIRES, place the City of Galveston on notice of his claim against the City for personal injuries which occurred on or about December 11, 1975, at approximately 5:30 p.m., when he was struck by a railroad car at 37th Street, Galveston, Texas. His injuries resulted in the amputation of his lower right leg and serious injury to his left leg with attendant pain and suffering and resulting mental anguish, resulting in total damages in the amount of $975,000.00 dollars. He is currently in John Sealy Hospital where he is receiving medical care as of this date. His legal residence is in Rio De Janerio, Brazil, for the last six months. He was a seaman from the M/V FRONTELESTE which was berthed at the Galveston Wharves on the date of this injury. We will call as witnesses to establish his claim: MARCOS AMARO DA SILVA, VALMOR JOSE MACHADO, and ANGELO TAMACNY CASTANHO FILHO, who are seamen aboard the M/V FRONTELESTE. Mr. Da Silva's address is Rua Santos Dummont, No. 590, Vila S. Luis-Caxias, Rio De Janerio, Brazil. Mr. Machado's address is Rua Jupiter 240-SS/201, Vigario Geral sc.91, Rio de Janeiro, R.J., 20.000 Brazil. Mr. Castanho Filho's address is Rua Manoel Correa, 37, Paranagua Parana, Brazil.

Respectfully yours,

ROYSTON, RAYZOR, COOK & VICKERY

By: Robert E. Bunce
Robert E. Bunce

THE STATE OF TEXAS §
§
COUNTY OF GALVESTON §

Before me, the undersigned authority, on this day personally appeared ROBERT E. BUNCE, who, being by me duly sworn, upon his oath states:

That he is one of the attorneys of record for STARKEISER DA SILVA MATO PIRES, claimant herein, that as such attorney he is duly qualified and authorized to make this affidavit; that he has read the foregoing Notice and that the statements of fact contained therein are true and correct upon his present information and belief.

Robert E. Bunce
Robert E. Bunce

SUBSCRIBED and SWORN TO before me, the undersigned authority, on this, the 17th day of December, 1975.

W. Lenfest
Notary Public in and for
Galveston County, Texas

W. Lenfest
Notary Public in and for Galveston County, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

AUG 3 1976

V. BAILEY HUGHES, CLERK
BY DEPUTY: Edith Rogers

STARKHEISER DA SILVA MATOS PIRES	§	
	§	
VS.	§	CIVIL ACTION NO. 75-G-173
	§	
THE CITY OF GALVESTON, ACTING BY AND THROUCH THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES	§	

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ORDER

On the 11th day of August, 1976, came on for consideration the Order of this Court of July 19, 1976, requiring Plaintiff, Starkheiser Da Silva Matos Pires, and Kenneth Heller, 277 Broadway, Room 1408 New York, New York 10007, to show cause why Plaintiff's apparent pro se Motion to Dismiss his cause without prejudice should be granted, or, if granted at all, why the dismissal should not be with prejudice. On the 11th day of August, 1976, neither the Plaintiff, Starkheiser Da Silva Matos Pires, nor Kenneth Heller appeared in person, in response to the Court's order of July 19, 1976.

Appearing were James L. Anthony, Attorney in Charge for The City of Galveston, acting by and through the Board of Trustees of the Galveston Wharves, Bryan F. Williams, Jr., this date substituted as Attorney in Charge for the firm of Royston, Rayzor, Vickery & Williams counsel of record for the Plaintiff, Robert S. DeLange and Robert E. Bunce, of the firm of Royston, Rayzor, Vickery & Williams, and Robert M. Julian, on behalf of the Brazilian Consul at Houston, Texas. Additionally, the Court had received and read, prior to the hearing, a letter from Kenneth Heller, dated August 6, 1976.

Whereupon the Attorney in Charge of record for the Plaintiff announced to the Court that his firm had no desire to continue the representation of the Plaintiff and wished to be discharged but,

under the Rules of this Court, was obligated to protect his rights in this cause pending the appearance of substitute counsel. Said counsel further announced that his firm did not under any circumstances wish any claim by Royston, Rayzor, Vickery & Williams against Plaintiff's or his cause of action to have the effect of keeping the case upon the docket of this Court if Plaintiff, properly advised, wished to dismiss it and the Court would do so without prejudice. Counsel did express to the Court concern over the possible effects of Rule 41(a)(1) F.R.C.P. in the event Plaintiff, through substitute counsel, is unable to obtain jurisdiction over all needed parties in a suit filed in another venue.

After reviewing the various pleadings, Motions, Opposition to such Motions, and all other papers filed of record in this action, and after hearing the statements of all persons at said hearing, the Court is the opinion that the following Orders should be entered, to-wit:

It is ORDERED that the Motion for Order Discontinuing Action of Starkheiser Da Silva Matos Pires, Pro Se, be, and the same is hereby denied. The Court finds that the granting of such Motion would result in undue legal prejudice to the Defendant City of Galveston, acting by and through the Board of Trustees of the Galveston Wharves, because it has previously answered, participated in discovery, was seeking to continue discovery at the time such Motion was filed, and, further, because undue burden and expense would necessarily be incurred by said Defendant in presenting its defense in another jurisdiction, should such Motion for voluntary dismissal of Plaintiff Pro Se be granted. This denial of Plaintiff's Pro Se Motion for voluntary dismissal is expressly not based or predicated upon any consideration of the matters set forth in the Motion to Withdraw filed by Plaintiff's counsel of record.

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It is further ORDERED that Defendant's Motion to Dismiss with prejudice be denied.

It is further ORDERED that the Motion of the Defendant, The City of Galveston, acting by and through the Board of Trustees of the Galveston Wharves, to compel Plaintiff to appear for oral deposition be, and the same is hereby granted. The Court finds that the circumstances and facts surrounding the Plaintiff's failures to appear previously, or at least to suggest alternatives if he could not appear for oral deposition on February 28, 1976 and March 12, 1976, dictate the conclusion that no cause existed for such failures. The Court further finds that Plaintiff's counsel of record had no notice of Plaintiff's apparent desire to terminate their services until after March 1, 1976.

The Court further ORDERS and DIRECTS the Plaintiff, Starkheiser Da Silva Matos Pires, to appear for oral deposition on Wednesday, September 15, 1976, at 10:00 o'clock A.M., at the offices of Henry W. Herbert, 466 Lexington Avenue, New York, New York 10017.

It is further ORDERED that the Motion of Robert S. DeLange and Royston, Rayzor, Vickery & Williams to withdraw be, and the same is hereby denied, without prejudice to such counsels' right to reurge said Motion upon substitution of new counsel and an Attorney in Charge for the Plaintiff. Plaintiff, Starkheiser Da Silva Matos Pires, is ordered to have new counsel and an Attorney in Charge substituted in this pending action and to appear of record in this action, on or before September 10, 1976. Such Attorney in Charge to be substituted for the Plaintiff, if he or she is not a member of the Bar of this Court, is hereby granted leave to appear as Attorney in Charge for Plaintiff, pending approval of an Application to Practice Before the United States District Court for the Southern District of Texas, which Application of said Attorney shall be filed at the

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time of substitution of counsel. Pending substitution of counsel for Plaintiff, Bryan F. Williams, Jr., of Royston, Rayzor, Vickery & Williams, is substituted as Attorney in Charge for Plaintiff, Starkheiser Da Silva Matos Pires.

The Court specifically finds that the firm of Royston, Rayzor, Vickery & Williams, have conducted the prosecution of Plaintiff's asserted cause of action and have protected the rights of the Plaintiff continuously to the present time with a high degree of diligence and professionalism. Said firm is hereby authorized to appear at the oral deposition of Plaintiff, Starkheiser Da Silva Matos Pires, heretofore ordered, and to direct questions to Starkheiser Da Silva Matos Pires regarding any and all matters relating to the Motion to Withdraw filed by Robert S. DeLange.

It is further ORDERED that the cost of appearance of J. Donald Deliz, as an Interpreter for this hearing, is hereby taxed as costs in this action, and the Court specifically finds that the Attorney in Charge for the Defendant, The City of Galveston, acting by and through the Board of Trustees of the Galveston Wharves, had the right reasonably to anticipate the appearance of the Plaintiff, Starkheriser Da Silva Matos Pires, by virtue of the Order to Show Cause heretofore entered by this Court on the 19th day of July, 1976. To this action of the Court Plaintiff's counsel of record objected and excepted.

Upon objection by Plaintiff's counsel of record the Motion of Defendant's counsel to require Plaintiff to bear Defendant's expense in connection with the deposition in New York is denied, and the issue of such reimbursement will be carried with the case.

The Clerk of this Court will notify Starkheiser Da Silva Matos Pires, Kenneth Heller and Robert M. Julian, as well as Bryan

F. Williams, Jr., and James L. Anthony of the entry of this Order.

DONE at Houston Texas, this 26 day of August,

1976.

Lynn N. Hughes
United States District Judge

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
By Edith Rogers
Deputy Clerk

C 104—Summons without Notice, Blank Court 4-64.
Personal or Substituted Service

COPYRIGHT 1964 BY JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

S. H. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs

against

CHICAGO ROCK ISLAND & PACIFIC R.R. CO.,

Defendant

Index No.

Plaintiff designates

New York

County as the place of trial

The basis of the venue is

Defendant's place of business

Summons

Plaintiff resides at

County of

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, New York
June 15, 1976

KENNETH HELLER
Attorney(s) for Plaintiffs

Office and Post Office Address
277 Broadway
New York, New York 10007
962-6005

TO: CHICAGO ROCK ISLAND &
PACIFIC R.R. CO.
500 Fifth Avenue
New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

CHICAGO ROCK ISLAND & PACIFIC R.R. CO.,

Defendant.

----------x

COMPLAINT

Plaintiffs, complaining of the defendant by their attorney, KENNETH HELLER, allege upon information and belief as follows:

AS AND FOR A FIRST CAUSE OF ACTION

FIRST: That at all the times hereinafter mentioned plaintiff, S. M. PIRES, was and still is a resident of the City and State of New York, and a merchant seaman employed by Frota Oceanica Brasileira, S.A., c/o Omnium Agencies, Inc., 42 Broadway, New York, New York.

SECOND: At all the times hereinafter mentioned, defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., was and is a corporation duly organized and existing under the laws of one of the states of the United States with an office for the transaction of business at 500 Fifth Avenue, New York, New York.

THIRD: At all the times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., owned a certain railroad and right of way known as Rock Island, Track #15, also designated as Track #15-24, located in Galveston, Texas, with said track crossing at grade, 37th Street, a public highway in said city,

approximately 55 feet from the intersection of Industrial Boulevard and 37th Street, Galveston, Texas.

FOURTH: At all the times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., managed a certain railroad and right of way known as Rock Island, Track #15, also designated as Track #15-24, located in Galveston, Texas, with the said track crossing at grade, 37th Street, a public highway in said city, approximately 55 feet from the intersection of Industrial Boulevard and 37th Street, Galveston, Texas.

FIFTH: At all the times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., controlled a certain railroad and right of way known as Rock Island Track #15, located in Galveston, Texas with the said track crossing at grade, 37th Street, a public highway in said city, approximately 55 feet from the intersection of Industrial Boulevard and 37th Street, Galveston, Texas.

SIXTH: At all the times hereinafter mentioned, defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., operated a certain railroad and right of way known as Rock Island Track #15, also designated as Track #15-24, located in Galveston, Texas with the said track crossing at grade, 37th Street, a public highway in said city, approximately 55 feet from the intersection of Industrial Boulevard and 37th Street, Galveston, Texas.

SEVENTH: At all the times hereinafter mentioned, defendant owned a certain railroad hopper car, bearing Serial or Identification No. 131529.

EIGHTH: At all the times hereinafter mentioned, defendant managed a certain railroad hopper car, bearing Serial or Identification No. 131529.

NINTH: At all the times hereinafter mentioned, defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., operated a certain railroad hopper car, bearing Serial or Identification No. 131529.

TENTH: At all the times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., controlled a certain railroad hopper car bearing Serial or Identification No. 131529.

ELEVENTH: At all times hereinafter mentioned, the said crossing was unguarded by any watchman, flagman, signal, warning bell, lights or whistle.

TWELFTH: On December 11, 1975, at about 8:45 p.m., plaintiff, a merchant seaman, in the exercise of all due care and caution, was walking from his vessel, FROTALESTE, in a northerly direction on said 37th Street and was crossing the tracks of the defendant at the said crossing located about 55 feet from the intersection of Industrial Boulevard and 37th Street in the City of Galveston, Texas, when a train of cars including hopper car #131529 which had been standing immediately to the east of said crossing, suddenly backed up without giving any signal or warning by bell, whistle, light or otherwise, and the rearmost car of said train, a/k/a hopper car #131529, struck plaintiff, ran over his right leg and dragged him about 100 feet, causing the injuries and damages hereinafter alleged.

THIRTEENTH: Said accident and the resulting injuries and damages to the plaintiff were caused by the negligence of the defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., railroad owner or operator of railroad right of way known as Rock Island Track #15 and railroad hopper car bearing Identification No. 131529; in

failing to maintain proper safety devices at the said "railway right of way crossing," a public thoroughfare; in failing to provide and maintain proper, adequate, and sufficient signals and barricades in and about its railroad right of way on Rock Island Track #15, also designated as Track #15-24; in failing to supply sufficient, adequate and properly-trained personnel to inform pedestrians that a railroad train was backing up on a public highway, thoroughfare, or public street; in failing to illuminate the rearmost railroad car of said railroad train while said railroad train was backing up; in failing to attach whistles, gongs, bells or sirens, or other warning devices to the said railroad hopper end car in a railroad train that was being backed up; in failing to illuminate the public highway, thoroughfare or public street at a railroad crossing; in failing to observe United States Governmental Regulations pertaining to the operation of railroad trains on or crossing a public highway or public thoroughfare or public street; in failing to observe United States Government regulations as to location, maintenance, and operation of safety devices; signal devices, other pedestrian warning devices by operators, or owners on the operation of said railroad right of way where it crosses a public highway, thoroughfare or public street; in failing to observe United States Government regulations pertaining to illumination of railroad operations when said operations utilize part or cross a public highway, public thoroughfare, or public street; in failing to observe applicable Texas statutes, ordinances, regulations, customs and practice insofar as operation by railroad owners or operators of railroad trains on crossing a public highway, public thoroughfare, or public

street; and in failing to observe applicable Texas statutes, ordinances, and regulations insofar as they require applicable railroad personnel, safety devices and signal devices, barricades, barriers warning whistles, gongs or bells, by a railroad owner or operator when a railroad train is backing up, or utilizing any part of a public highway throughfare, or public street, while being operated thereon; in failing to observe applicable statutes, ordinances, or regulations of the City of Galveston, and County of Galveston, applicable to the operation of a railroad right of way, more specifically Rock Island Track #15, also designated as Rock Island Track #15-24, and the operation thereon of a railroad car including car #131529, while utilizing said railroad car #131529, on crossing a public highway, public thoroughfare, or public street, by backing across same;and also in failing to observe applicable thereto any ordinances, statutes, regulations of the City of Galveston requiring that equipment for operation of railroad trains such as lights, whistles, gongs, bells, warning signals, or any other lighting device or warning signals required to be utilized during the night time hours while railroad operations are proceeding on the public highway ,to wit, 37th Street, Galveston, or any other part of the County and City regulations applicable thereto.

FOURTEENTH: That by reason of the foregoing accident of December 11, 1975, the plaintiff was rendered sick, sore, lame and disabled; has suffered and will continue to suffer great pain, agony and mental anguish; has been and will be prevented from attending to his usual duties and vocation resulting in loss of

earnings and impairment of earning capacity; has been and will continue to be obliged to undergo rehabilitation, medical and surgical attention and treatment, nursing care, hospital care and medicines, and has incurred pecuniary obligations therefore, and upon information and belief the aforesaid injuries are permanent in nature and said loss of earnings and pecuniary losses and obligations will continue in the future.

FIFTEENTH: That by reason of the premises the plaintiff suffered damages in the sum of THREE MILLION AND 00/100 ($3,000,000.00) DOLLARS.

AS AND FOR A SECOND CAUSE OF ACTION

SIXTEENTH: Plaintiffs repeat, reiterate, and reallege each and every allegation contained in paragraphs numbered FIRST through FOURTEENTH inclusive of the First Cause of Action with the same force and effect as though fully set forth at length herein.

SEVENTEENTH: That at all the times hereinafter mentioned, plaintiff, VIRGINIA PIRES, was the wife of S. M. PIRES.

EIGHTEENTH: By reason of said injuries to plaintiff, S.M. PIRES, her husband, plaintiff has suffered mental anguish by being forced to witness the suffering endured by her husband whereby her own nerves and health have been seriously and permanently shocked, weakened, and impaired, and by reason of the physical and mental condition of her husband she still continues to suffer in mind and body, and has been denied the care, protection, consideration, companionship, aid, sexual relations, solace and society of her said husband, and the pleasure and assistance of her husband in escorting her to visit friends and relatives, and

has been deprived of her husband's assistance in rearing their children, and that by reason of the foregoing in the loss of her husband's consortium, plaintiff has been damaged in the sum of ONE MILLION AND 00/100 ($1,000,000.00) DOLLARS.

WHEREFORE, plaintiffs demand judgment against the defendant in the sum of THREE MILLION AND 00/100 ($3,000,000.00) DOLLARS on the First Cause of Action and ONE MILLION AND 00/100 ($1,000,000.00) DOLLARS on the Second Cause of Action making in all a total of FOUR MILLION AND 00/100 ($4,000,000.00) DOLLARS together with the costs and disbursements of this action.

KENNETH HELLER
Attorney for Plaintiffs
Office & P.O. Address
277 Broadway
New York, New York 10007
(212) 962-6085

SUMMONS IN A CIVIL ACTION

(Formerly D.C. Form No. 1 a Rev. 7-39)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 76 Civ. 3959

(J. Cagliardi)

E. M. GIBES and VIRGINIA GIBES, his wife,

Plaintiffs

v.

CHICAGO ROCK ISLAND & PACIFIC R.R. CO., and ROCK ISLAND COMMUTER SERVICES, Inc.,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon KENNETH KELLER

plaintiff's attorney, whose address is 277 Broadway, New York, New York 10007

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court

Deputy Clerk

Date: New York, New York
July 29, 1976

(Seal of Court)

NOTE—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

S. M. PIRES and VIRGINIA PIRES,
his wife,

AMENDED COMPLAINT

Plaintiffs,

-against-

CHICAGO ROCK ISLAND & PACIFIC R.R. CO.,
and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------X

Plaintiffs, complaining of the defendants by their attorney, KENNETH HELLER, allege upon information and belief as follows:

AS AND FOR A FIRST CAUSE OF ACTION

FIRST: That at all the times hereinafter mentioned plaintiff, S. M. PIRES, was and still is a resident of the City and State of New York, and a merchant seaman employed by Frota Oceanica Brasileira, S.A., c/o Omnium Agencies, Inc., 42 Broadway, New York, New York.

SECOND: That at all the times hereinafter mentioned, FROTA OCEANICA BRASILEIRA, S.A., was a Brazilian Corporation with an office c/o Omnium Agencies, Inc., at 42 Broadway, New York, New York.

THIRD: That at allthe times hereinaftermentioned, FROTA OCEANICA BRASILEIRA, S.A., owned, operated, managed and controlled the vessel, FROTALESTE, and employed plaintiff as a seaman.

FOURTH: At all the times hereinafter mentioned, defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., was and is a corporation

duly organized and existing under the laws of one of the states of the United States with anoffice for the transaction of business at 500 Fifth Avenue, New York, New York.

FIFTH: At all the times hereinafter mentioneddefendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., owned a certain railroad and right of way known as Rock Island, Track #15, also designated as Track #15-24, located in Galveston, Texas, with said track crossing at grade, 37th Street, a public highway in said city, approximately 55 feet from the intersection of Industrial Boulevard and 37th Street, Galveston, Texas.

SIXTH: At all the times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., managed a certain railroad and right of way known as Rock Island, Track #15, also designated as Track #15-24, located in Galveston, Texas, with the said track crossing at grade, 37th Street, a public highway in said city, approximately 55 feet from the intersection of Industrial Boulevard and 37th Street, Galveston, Texas.

SEVENTH: At all the times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R.CO., controlled a certain railroad and right of way known as Rock Island Track #15, located in Galveston, Texas with the said track crossing at grade 37th Street, a public highway in said city, approximately 55 feet from the intersection of Industrial Boulevardand 37th Street, Galveston, Texas.

EIGHTH: At all the times hereinaftermentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., operated a certain railroad and rightof way known as Rock Island Track #15, also designated

as Track #15-24, located in Galveston, Texas with the said track crossing at grade 37th Street, a public highway in said city, approximately 55 feet from the intersection of Industrial Boulevard and 37th Street, Galveston, Texas.

NINTH: At all the times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., owned a certain railroad hopper car, bearing Serial or Indentification No. 131529.

TENTH: At all the times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., managed a certain railroad hopper car, bearing Serial No. or Identification No. 131529.

ELEVENTH: At all the times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., operated a certain railroad hopper car, bearing Serial or Identification No. 131529.

TWELFTH: At all times hereinafter mentioned defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., controlled a certain railroad hopper car bearing Serial or Identification No. 131529.

THIRTEENTH: At all times hereinafter mentioned, the said crossing was unguarded by any watchman, flagman, signal, warning bell, lights or whistle.

FOURTEENTH: On December 11, 1975, at about 8:45 p.m., plaintiff, a merchant seaman, in the exercise of all due care and caution was walking from his vessel, FROTALESTE, in a northerly direction on said 37th Street and was crossing the tracks of the defendant at the said crossing located about 55 feet from the intersection of Industrial Boulevard and 37th Street in the City of Galveston, Texas, when a train of cars including hopper car #131529 which had been standing immediately to the east of said

crossing, suddenly backed up without giving any signal or warning by bell, whistle, light or otherwise, and the rearmost car of said train, a/k/a hopper car #131529, struck plaintiff, ran over his right leg and dragged him about 100 feet, causing the injuries and damages hereinafter alleged.

FIFTEENTH: Said accident and the resulting injuries and damages to the plaintiff were caused by the negligence of the defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO., railroad owner or operator of railroad right of way known as Rock Island Track #15, and railroad hooper car bearing indentification No. 131529; in failing to maintain proper safety devices at the said "railway right of way crossing", a public thoroughfare; in failing to provide and maintain proper, adequate, and sufficient signals and barricades in and about its railroad right of way on Rock Island Track #15, also designated as Track #15-24; in failing to supply sufficient, adequate and properly-trained personnel to inform pedestrians that a railroad train was backing up on a public highway, thoroughfare, or public street; in failing to illuminate the rearmost railroad car of said railroad train while said railroad train was backing up; in failing to attach whistles, gongs, bells or sirens, or other warning devices to the said railroad hopper end car in a railroad train that was being backed up; in failing to illuminate the public highway, thoroughfare or public street at a railroad crossing; in failing to observe United States Governmental Regulations pertaining to the operation of railroad trains on or crossing a public highway or public thoroughfare or public street; in failing to observe United States Government

regulations as to location, maintenance, and operation of safety devices; signal devices, other pedestrial warning devices by operators, or owners on the operation of said railroad right of way where it crosses a public highway, thoroughfare or public street; in failing to observe United States Government regulations pertaining to illumination of railroad operations when said operations utilize part or cross a public highway, public thoroughfare, or public street; in failing to observe applicable Texas statutes, ordinances, regulations, customs and practice insofar as operation by railroad owners or operators of railroad trains on crossing a public highway, public thoroughfare, or public street; and in failing to observe applicable Texas statutes, ordinances, and regulations infofar as they require applicable railroad personnel, safety devices and signal devices, barricades, barriers, warning whistles, gongs or bells, by a railroad owner or operator when a railroad train is backing up, or utilizing any part of a public highway, thoroughfare, or public street,while being operated thereon; in failing to observe applicable statutes, ordinances, or regulations of the City of Galveston, and County of Galveston, applicable to the operation of a railroad right of way, more specifically Rock Island Track #15, also designated as Rock Island Track #15-24, and the operation thereon of a railroad car including car #131529, while utilizing said railroad car #131529, on crossing a public highway, public thoroughfare, or public street, by backing across same; and also in failing to observe applicable thereto any ordinances, statutes, regulations of the City of Galveston requiring that equipment for operation of railroad trains such as lights, whistles, gongs, bells, warning signals, or any other lighting devices or warning signals required to be utilized during the

night time hours while railroad operations are proceeding on the public highway, to wit, 37th Street, Galveston, or any other part of the County and City regulations applicable thereto.

SIXTEENTH: That by reason of the foregoing accident of December 11, 1975, the plaintiff was rendered sick, sore, lame and disabled; has suffered and will continue to suffer great pain, agony and mental anguish; has been and will be prevented from attending to his usual duties and vocation resulting in loss of earnings and impairment of earning capacity; has been and will continue to be obliged to undergo rehabilitation, medical and surgical attention and treatment, nursing care, hospital care and medicines, and has incurred pecuniary obligations therefore, and upon information and belief the aforesaid injuries are permanent in nature and said loss of earnings and pecuniary losses and obligations will continue in the future.

SEVENTEENTH: That by reason of the premises the plaintiff suffered damages in the sum of THREE MILLION AND 00/100 ($3,000,000.0 DOLLARS.

AS AND FOR A SECOND CAUSE OF ACTION

EIGHTEENTH: Plaintiffs repeat, reiterate, and reallege each and every allegation contained in paragraphs numbered FIRST through SIXTEENTH inclusive of the First Cause of Action with the same force and effect as though fully set forth at length herein.

NINETEENTH: That at all the times hereinafter mentioned, plaintiff, VIRGINIA PIRES, was the wife of S. M. PIRES.

TWENTIETH: By reason of said injuries to plaintiff, S.M. PIRES, her husband, plaintiff has suffered mental anguish

by being forced to witness the suffering endured by her husband whereby her own nerves and health have been seriously and permanently shocked, weakened, and impaired, and by reason of the physical and mental condition of her husband she still continues to suffer in mind and body, and has been denied the care, protection, consideration, companionship, aid, sexual relations, solace and society of her said husband, and the pleasure and assistance of her husband in escorting her to visit friends and relatives, and has been deprived of her husband's assistance in rearing their children, and that by reason of the foregoing in the loss of her husband's consortium, plaintiff has been damaged in the sum of ONE MILLION AND 00/100 ($1,000,000.00) DOLLARS.

AS AND FOR A THIRD CAUSE OF ACTION
AGAINST FROTA OCEANICA BRASILEIRA, S.A.

TWENTY-FIRST: Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs numbered First through Eighth and Fourteenth and Fifteenth of the First Cause of Action with the same force and effect as though fully set forth at length herein.

TWENTY-SECOND: That suit is brought under the General Maritime Law.

TWENTY-THIRD: That on December 11, 1975, without any negligence or omission on the part of the plaintiff herein, plaintiff suffered grave personal injuries as hereinafter set forth.

TWENTY-FOURTH: On December 11, 1975, at about 8:45 p.m., plaintiff, a merchant seaman, in the exercise of all due care and caution was walking from his vessel, FROTALESTE, in a northerly

direction on said 37th Street and was crossing the tracks of the defendant at the said crossing located about 55 feet from the intersection of Industrial Boulevard and 37th Street in the City of Galveston, Texas, when a train of cars including hopper car #131529 which had been standing immediately to theeast of said crossing, suddenly backed up without giving any signal or warning by bell, whistle, light or otherwise, and the rearmost car of said train, a/k/a hopper car #131529, struck plaintiff, ran over his right leg and dragged him about 100 feet causing the injuries and damages hereinafter alleged.

TWENTY-FIFTH: That plaintiff's injuries and damages were caused by reason of the negligence of the defendant through its agents, servants and employees by failure to instruct plaintiff on a safe means of egress from the vessel; failure to furnish plaintiff with a safe passage from the vessel to the City of Galveston; failure to furnish plaintiff with sufficiently trained personnel; and in addition it failed to perform the duties of a shipowner all of which caused the plaintiff serious, painful and disabling personal injuries.

TWENTY-SIXTH: That by reason of the foregoing accident of December 11, 1975, the plaintiff was rendered sick, sore, lame and disabled; has suffered and will continue to suffer great pain, agony and mental anguish; has been and will be prevented from attending to his usual duties and vocation resulting in loss of earnings and impairment of earningcapacity; has been and will continue to be obliged to undergo rehabilitation, medical and surgical attention

and treatment, nursing care, hospital care and medicine, and has incurred pecuniary obligations therefore, and upon information and belief the aforesaid injuries are permanent in nature and said loss of earnings and pecuniary losses and obligations will continue in the future.

TWENTY-SEVENTH: That by reason of the foregoing, the plaintiff suffered damages in the sum of THREE MILLION AND 00/100 ($3,000,000.00) DOLLARS.

WHEREFORE, plaintiffs demand judgment against the defendants in the sum of THREE MILLION AND 00/100 ($3,000,000.00) DOLLARS on the First Cause of Action; ONE MILLION AND 00/100 ($1,000,000.00) DOLLARS on the Second Cause of Action, and THREE MILLION AND 00/100 ($3,000,000.00) DOLLARS on the Third Cause of Action, making in all a total of SEVEN MILLION AND 00/100 ($7,000,000.00) DOLLARS together with the costs and disbursements of this action.

KENNETH HELLER
Attorney for Plaintiffs
Office & P.O. Address
277 Broadway
New York, New York 10007
(212) 962-6085

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

S. M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

CHICAGO ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

Civil Action No. 76 Civ. 3050

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

CLAIRE I. WEINBERG, being duly sworn, deposes and says that deponent is not a party to the action or proceeding at is over 18 years of age and resides at 16 Shore Park Road, Great Neck, New York.

That on the 29th day of July, 1976 at approx. deponent served the annexed Summons and Complaint in this action, on FROTA OCEANICA BRASILEIRA, S.A, c/o OMNIUM AGENCIES, INC.,at 42 Broadway, New York, New York, a corporation, the defendant therein named, by delivery a true copy thereof to personally, the

of said corporation: deponent knew the said corporation to served to be the corporation mentioned and described as defendant therein and knew to be thereof.

Sworn to before me, this 2?
day of July, 1976

RICHARD BETTERAT
Notary Public, State of New York
No. 24-0134
Qualified in Nassau County
Commission Expires March 30, 19 2?

CLAIRE I. WEINBERG

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

Check Applicable Box

☒ Individual Verification — S. M. PINES being duly sworn, deposes and says: deponent is one of the Plaintiffs in the within action; deponent has read the foregoing Amended Complaint which was read and translated to me, and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: The contents of the file.

Sworn to before me on July 1976

/s/
S. M. PINES
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF 29 ss.:

is over 18 years of age and resides at being duly sworn, deposes and says: deponent is not a party to the action,

Check Applicable Box

☐ Affidavit of Service By Mail — On July 29 1976 deponent served the within Amended Complaint upon Liberty Co. Inc. attorney(s) for Defendant Reco in this action, at 466 Lexington Ave. NY 29 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on July 29 1976

.....
The name signed must be printed beneath

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

76 Civ. 3050 (LPG)

NOTICE OF CROSS-MOTIO TO REMAND AND/OR DISMISSAL WITHOUT PREJUDICE

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of KENNETH HELLER, sworn to on the 8th day of September, 1976, and upon all the pleadings and proceedings heretofore had or taken herein, the undersigned will move this Court at Room 1505, before the Hon. Judge Lee Gagliardi, to be located at the Court House at Foley Square, New York, New York, on the 14th day of September, 1976, at 4:00 P.M. or, as soon thereafter as counsel can be heard for an order, pursuant to 28 U.S.C., 1447 (c), remanding this action to the Supreme Court of the State of New York, County of New York, or in the alternative for an order pursuant to Rule 41 (a)(2) of the Federal Rules of Civil Procedure, for a dismissal of this action without prejudice, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
September 8, 1976

Yours, etc.,

KENNETH HELLER
Attorney for Plaintiff
Office & P.O. Address
277 Broadway
New York, New York 10007
(212) 962-6085

TO: HENRY W. HERBERT
Attorney for Defendant
CHICAGO ROCK ISLAND &
PACIFIC CO.
466 Lexington Avenue
New York, New York 10017
340-2530

CICHANOWICZ & CALLAN,
Attorneys for Defendant
FROTA OCEANICA BRASILEIRA
67 Broad Street
New York, New York 10004

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

S.M. PIRES and VIRGINIA PIRES,

Plaintiffs,

AFFIDAVIT

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

KENNETH HELLER, being duly sworn, deposes and says:

I am an attorney at law of the State of New York, attorney for the plaintiff herein and am fully familiar with all the pleadings and proceedings heretofore had herein.

This affidavit is submitted in support of plaintiff's motion to remand this case to the Supreme Court of the State of New York, County of New York or, in the alternative, for an order voluntarily dismissing this action without prejudice.

Although it is arguable that there is diversity jurisdiction between the plaintiffs and CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., there is no doubt that FROTA OCEANICA BRASILEIRA, S.A., is a Brazilian Corporation and that there is no diversity between it and the plaintiffs. Under these circumstances, this Court does not have jurisdiction since there can never be diversity between two aliens and, consequently, since there is no diversity between plaintiffs and <u>both</u> defendants, this Court should grant the motion to remand.

The facts in opposition to defendant CHICAGO, ROCK ISLAND

& PACIFIC R.R. CO.'s motion to transfer are contained in a separate affidavit, but some of these facts are relevant to this motion. Since plaintiff is here with his wife and son, and since plaintiff STARKEISER PIRES, and his son are both undergoing medical care in New York, and this action was commenced in New York, where the plaintiffs reside, in the interest of justice this action should be remanded to the Supreme Court of the State of New York from which it was removed.

The basis for remand is the fact that this Court does not have jurisdiction of the parties or the action since it is an action of an Allen, against another allen joined with a United States citizen, therefore no diversity exists and this Court has the right to dismiss but, since the action originated in the Supreme Court, New York County, your deponent asks that it be remanded to the court of origin.

WHEREFORE, it is respectfully requested that this action be remanded to the State Court, or in the alternative, be dismissed without prejudice.

/S/
KENNETH HELLER

Sworn to before me this
8th day of September, 1976

WILSON C. PIRES
Notary Public, State of New York
Qualified in Kings County
Commission Expires March 30, 1977

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

KENNETH HELLER being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 277 Broadway, New York, New York

Affirmed

Check Applicable Box

☒ Affidavit of Service By Mail — On September 8, 1976 deponent served the within Notice of Cross Motion upon Henry W. Herbert, attys for CHICAGO RUK ISLAND & PACIFIC R.R. CO. at 60 Lexington Ave., NY NY and Cichanowicz & Callan attnys for Frota at the address designated by said attorney(s) for that purpose 60 Broad Street, NY NY in this action, at by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Affirmed on

Sworn to before me on September 8, 1976

KENNETH HELLER
The name signed must be printed beneath

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs,

76 Civ. 3050
(J. Gagliardi)

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO.,

Defendant.

----------x

PLAINTIFFS'
MEMORANDUM OF LAW
IN SUPPORT OF CROSS-MOTION
TO REMAND

PART I

DEFENDANT HAS THE BURDEN OF
PROVING THAT DIVERSITY EXISTS
BETWEEN THE PARTIES

In its removal petition, defendant alleges that plaintiffs are residents of New York and citizens of Brazil. On a motion to remand, defendant has the burden of proving the jurisdictional allegations in its removal petition. See Jerro vs. Home Lines, Inc., 377 F. Supp. 670 (SDNY 1974) where the Court stated at p. 672 as follows:

> "The defendant here has"the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea

> that jurisdiction may be maintained by mere averment. . . . If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936); Thomson v. Gaskill, 315 U.S. 442, 446, 62 S.Ct. 673, 86 L.Ed. 951 (1942). Thus, even though it is the plaintiff who contests federal jurisdiction, on the motion to remand to state court, the burden is on the defendant to satisfy the court that the defendant's principal place of business is in fact in a place other than New York. See e.g. Nassau Sports v. Peters, 352 F. Supp. 867, 868 (E.D.N.Y. 1972); Chu v. Plastic Systems Corp., 308 F.Supp. 1189, 1191-92 (S.D.N.Y. 1969); Leve v. General Motors Corp., 246 F. Supp. 761, 762 (S.D.N.Y. 1965)."

First, defendant has to establish that its principal place of business is some place other than New York and, second, it has to establish that plaintiffs are <u>citizens</u> of a state or country sufficient to establish diversity. It is clear that under 28 U.S.C. 1332 (a), the test is citizenship, not residence.

Consequently, since plaintiffs contest the removal as improper, defendant has to prive its allegation that diversity exists.

Respectfully submitted,

KENNETHKELLER
Attorney for Plaintiff

Affidavit of Service
by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Zillah Lawrence, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 430 West 24th Street, New York, New York.

On July , 1976, deponent served the within Notice of Cross-motion and Memorandum of Law in support of said motion upon Henry W. Herbert, attorney for Defendant at 466 Lexington Avenue, New York, New York, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office, official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Zillah Lawrence

Sworn to before me on

this day of July, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs,

-against-

CHICAGO, ROCK, ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

76 CIV. 3050 (LPG)

SUPPLEMENTAL MEMO IN INSUPPORT OF PLAINTIFFS' POSITION TO REMAND THE ACTION TO SUPREME COURT, NEW YORK COUNTY AND IN OPPOSITION TO DEFENDANT'S MOTION FOR TRANSFER TO ANOTHER FORUM

POINT I

JURISDICTION OF THIS ACTION NO LONGER LIES IN THE UNITED STATES DISTRICT COURT

The case before this Court is substantially different from the original action which was removed from the New York State Court, Supreme Court, New York County, by defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO.

The amendment to the complaint brought by an alien, a foreign merchant seaman, PIRES, against his former employer FROTA OCEANICA BRASILEIRA, S.A., an alien corporation, with an

office in New York is now joined with the other defendant, CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., the United States citizen, (a railroad corporation).

In its present posture, the matter before this Court is without jurisdiction. Title 28 U.S.C.A. 1332 only pertains to domestic corporations.

To this effect, see Mazzella v. Pan Oceanica A/S Panama, (SDNY) 232 F. Supp. 31, Notes 3-5, and also the opinion of U.S.C.A. (2 Cir.) in Dassigienis v. Cosmos Carriers & Trading Corp., 442 F. 2d 1016, 1017 (Note 3).

POINT II

THIS ACTION CANNOT BE REMOVED BECAUSE THE DEFENDANT, FROTA OCEANICA BRASILEIRA, S.A., IS NOT AMENABLE TO PROCESS IN THE PROPOSED FORUM

In the event this Court determines that there is jurisdiction over this action and, of course, according to the procedure set forth in Romero v. International Terminal Operating Co., 358 U.S. 354, jurisdiction must be the first matter considered. Assuming aguendo that this Court finds jurisdiction, then the defendant has the burden set forth by 28 U.S.C.A. 1404(a) of proving that a transfer would be for the convenience of the parties, and in the interest of justice. See Judge MacMahon's opinion in Jones Knitting Corporation v. A.M. Pullen

& Company, 50 F.R.D. 311, Page 316, Note 14:

> "The burden of establishing the necessity for a transfer is on defendant, since plaintiff's choice of a proper forum should usually be respected. Defendant must tip the scale substantially in his favor to upset plaintiff's choice.[13]
>
> There is no dispute that this action could have been commenced in the proposed transferee court. The dispute involves the convenience of parties and witnesses. The thrust of defendants' claim of inconvenience is that the action involves installation of equipment in North Carolina and the vast majority of both party and nonparty witnesses and relevant demonstrative evidence is necessarily located in North Carolina.
>
> Defendants do not, however, particularize the number of allegedly inconvenienced witnesses, their names or the substance of their testimony.[14] Many of these witnesses may very well be defendants' employees or expert witnesses, and there is no allegation that they are unwilling or unable to come to New York.[15]"

Defendant, CHICAGO, ROCK ISLAND & PACIFIC R.R.CO. has not carried its burden and not met the requirements of 28 U.S. C.A. 1404(a). Their list of proposed witnesses, in their moving papers, does not contain any designation of job titles to show relevancy to this accident. In addition thereto, it does not set forth exactly what their proposed witnesses would

say at trial and point out how their proposed testimony is relevant to this action. Therefore, since defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. have not met their burden under this statute considering, of course, that the plaintiffs' choice of forum is rarely disturbed, transfer should be denied.

Judge Gurfein of this Court in his opinion in The Fluor Corporation, Ltd. v. S/S PRESIDENT Coolidge, her engines, etc., 52 F.R.D. 538, at Page 539, points out that Courts sitting in Admiralty have the power to reject an action when both plaintiff and defendant are foreigners (aliens). In his opinion, he refers to the Supreme Court opinion of Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 508:

> ". . . . unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

In Clay v. Overseas Carriers Corp., 61 F.R.D. 325, the Court in giving us its opinion on a Jones Act seaman's case referred to Shutte v. Armco Steel Corporation, 431, F. 2d, 22, 25 and the Court in reiterated the general rule of Armco and other cases when it said at Page 330, (Notes 6,7):

> "A superficial reading of the defendants' motion may suggest a plausible basis for granting a transfer motion. However, in passing on the appropriateness of transfer, a superficial reading is inadequate. Conclusory affidavits are not helpful and are insufficient. The names and location of witnesses should be supplied. Statements should be furnished as to the materiality of testimony of alleged witnesses. Such

> standards are necessary if the Court is to make a rational decision. For example, the mere fact that the greatest number of potential witnesses are at a particular location is not sufficient if the Court can not ascertain which of these will be called and the materiality of the testimony thereof. If the defendant has not produced such information so as to provide the Court with a rational basis for transferring an action and depriving a plaintiff of his choice of forum, then the defendant has not sustained his burden."

The Court, in Clay v. Overseas Carriers Corp., supra. discussed Point 2 of plaintiffs' position in that defendants alleged that defendant FROTA OCEANICA BRASILEIRA, S.A. was amenable to service of process in the poposed jurisdiction, the moving party still having the burden must prove to the Court that they are amenable for service of process in the proposed new forum; mere allegations or claims that they will accept service of process do not fulfill the requirements of 28 U.S.C.A. 1404(a) and it is incumbent upon this Court to deny transfer to a new forum if defendants cannot prove they are amenable to service, and it matters not that the defendants consent to accept service of process in the jurisdiction. In G.G. McCool et al. v. River Gulf Corporation et al., 53 F.R.D. 484, defendant acknowledged that they were not present in the proposed jurisdiction.

> "... This defendant admits that the action is not subject to transfer

under 28 U.S.C.A. §1414(a) since the action could not have been brought initially in the Louisiana court, but he proposes to enter his appearance in the Louisiana court should the court order the transfer of the action."

Before this Court now we have a railroad corporation which is attempting to convince this Court that defendant FROTA is amenable to service in a jurisdiction where they have no officer, agent, or have a filed a-doing-business certificate or have any of its employees, and peculiarly FROTA has not come forth and carried their burden of proving they are amenable to service in the Southern District of Texas. It seems that defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. continues to volunteer FROTA as amenable to service of process but FROTA is silent as to its position.

There is no duty incumbent upon plaintiffs or this Court to transfer this action to a jurisdiction where defendant FROTA is not amenable to service of process, and for this Court to transfer this matter is in derogation of the statute and of the holding in Hoffman v. Blaski, 363 U.S. 335, and a transfer would most certainly visit an incredible hardship on the plaintiff seaman.

Respectfully submitted,

KENNETH HELLER
Attorney for Plaintiffs

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ZILLAH LAWRENCE, being duly sworn, deposes and says:

deponent is not a party to the action, is over 18 years of age and resides at 430 West 24th St., NY NY.

On Sept. 13, 1976, deponent served the within Supplemental Memo upon Henry W. Herbert, attorney for Deft CHICAGO ROCK ISLAND at 466 Lexington Ave., NY NY and Chichagowicz & Callan, attorneys for deft FROTA at 80 Broad St., NYNY , the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in a post office depository under the exclusive care and custofy of the United States Postal Service of New York.

Zillah Lawrence

Sworn to before me this
13th Day of September, 1976

KENNETH HELLER
Notary Public, State of New York
Qual. in Nassau Co. No. 31-[illegible]0325
Certificate filed in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

76 Civ. 3050 (LPG)

AFFIDAVIT IN OPPOSITIO TO DEFENDANT'S MOTION TO TRANSFER

KENNETH HELLER, being duly sworn, deposes and says:

I am an attorney at law of the State of New York, attorney for the plaintiffs herein and am fully familiar with all the pleadings and proceedings heretofore had herein.

This affidavit is submitted in opposition to defendant CHICAGO ROCK ISLAND & PACIFIC R.R. CO.'s motion to transfer this action to Texas. Plaintiff will deal with each issue raised.

First, although defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. attempts to mislead this Court, and in its answer denies ownership,operation and control of the railroad tracks involved, the accident report of the Port of Galveston indicates that the accident to Pires happened on the CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. Track #15 (ROCK ISLAND #15) and since this was a crossing on a public street, CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. could be liable for, among other things, improper warning devices at the crossing. See a copy of that report attached hereto as Exhibit "A"

Furthermore, the Port of Galveston is present in New York for the service of process and can be impleaded in action in this Court or in the State Courts.

The Port of Galveston and Galveston Wharves operates offices at 370 Lexington Avenue, New York, New York. See copy of letter attached hereto as Exhibit "B", and they solicit business in this jurisdiction and are amenable to suit here.

Second, defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. lists names of alleged witnesses, in their previous application to the Court, all admittedly employees of the Port of Galveston, without any indication of exactly what each person on the list claims to have witnesses, and whether such witnesses are material and necessary to the defense of this action by defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO.

We have cited sufficient authorities to support our position that defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. is bound to specify the exact testimony that would be made by their potential witnesses and show how this testimony is so material to the happening of the accident that the presence of these witnesses is necessary for trial.

It is our position that defendant merely picked at random a list of employees of Galveston Wharves who happen to be employed and set their names down hoping that by sheer superiority of numbers this list of witnesses would balance the scales in favor of defendant's position of removing this matter to Galveston. The issue here is not one of who can create the greatest of names but what

are the specific facts that these people listed in defendant's moving papers would testify to that is material and relevant to the actual happening of the accident. Plaintiff submits that some of the people listed by defendant were not employed on the day in question, and not one of them saw what happened from some 350 feet away in the dark.

It is our contention that the accident occurred in a completely pitch dark area, on a main and public road, when the end railroad car was pushed backwards from a locomotive some 350 feet from the situs of the accident or more that not one of anyone's employees, other than the three Brazilian co-employees of plaintiff, saw the accident, nor did they come to the site of the accident till after a Brazilian seaman ran some 350 feet in the dark and aroused the attention of someone who had some control over the locomotive.

Defendant's crossing as stated was unlit, unmarked, without any safety devices, guards, bells and defendant's railroad car had no devices of any type to signal that it was about to be backed up, nor was there any indication that it was to be removed. The area was completely in darkness and there was not even a red warning lantern at the back of the railroad car, and defendant's railroad car was setting right smack in the public highway on defendant's railroad track, completely immobile, without anyone watching or warning that it was about to suddenly move. Therefore, defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. would attempt to pursuade this Court that by sheer numbers of witnesses listed the case should be transferred to Texas. It is not the numbers of alleged witnesses but the quality of the testimony of the witnesses that count.

Third, the only actual eye witnesses to the accident were the co-employees of the plaintiff, one of whom is presently employed on a Brazilian ship that visits New York every 30 days, and the other two will also be employed on Brazilian vessels in the near future and will also be amenable to any State Court here in New York.

With regard to the depositions taken of the Brazilian seaman's co-employees, these depositions are inadmissible any action here since the parties in the action in New York are not the same parties in any action in any other jurisdiction.

Fourth, all plaintiff's hospital records from Texas are in the possession of your deponent, copies of which can be furnished to anyone. All these records reflect is that plaintiff's leg was amputated. The important aspect of this case is how and and in what manner plaintiff has been rehabilitated by the Rusk Pavilion here in New York and if he can help himself; not the fact that an amputati has taken place but the result of the amputation. The plaintiff's rehabilitation physician is, of course, at the Rusk Pavilion here in New York.

Fifth, with regard to police reports, all of them including photographs of the plaintiff seaman's accident could be admitted in any Court in New York since the reports and photographs show that the plaintiff was struck by defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO.'s railroad car which was backing up along an unmarked, unlighted, and unregulated right of way also owned and controlled by defendant CHICAGO,ROCK ISLAND & PACIFIC R.R. CO. when he was dragged some 100 feet by the undercarriage of the railroad car. The police department's witnesses have adequately set forth their investigation in their entire and thorough police reports which

are presently in the possession of defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO.

Sixth, plaintiff is presently residing in New York with his wife and infant son, Jeffrey, and is being treated on an outpatient basis by the Rusk Pavilion and is being financially supported by defendant FROTA OCEANICA BRASILIERA, S.A. while he is an outpatient. His wife was brought here by defedant FROTA OCEANICA BRASILIERA, S.A. to take care of him since he is, to a certain extent, helpless and, of course, it goes without saying that this provides a substantial saving in medical expensesto FROTA OCEANICA BRASILIERA, S.A. because the in-patient rate at Rusk Pavilion is approximately $5,000 a month.

To recapitulate: It is plaintiff's position that the following items weigh the balance of choice of forum for this jurisdiction in the State of New York:

1) Actual eye witnesses are available in this jurisdiction;

2) medical records are available here. The important rehabilitation records and doctors are here in New York;

3) all police reports can be admitted here;

4) plaintiff, his wife and child reside here;

5) plaintiff, an indigent Brazilian seaman, cannot afford to travel to Texas, nor can he afford to reside there with his wife and child because he is undergoing treatment here in New York;

6) plaintiff will not receive a fair trial in Texas.

With regard to plaintiff's action in Texas which plaintiff has asked the Court to discontinue, this action was brought by a law firm who, while also representing the P&I representatives for

the ship, attempted to have plaintiff settle his case for the sum of $80,000.

Plaintiff presently has a malpractice action pending in this jurisdiction against this former law firm. It goes without saying that plaintiff, a foreigner, not able to read or write the English language, would not receive an even handed justice in a Court in Galveston, Texas, in an action brought against the City of Galveston by plaintiff.

In the interests of justice, plaintiff respectfully requests the Court to deny the motion for transfer and grant plaintiff's motion to remand this case back to the State Court from which it was removed.

/s/
KENNETH HELLER

Sworn to before me this
9th day of September, 1976

WILSON G. GRAVES
Notary Public, State of New York
No. 03-6570875
Qualified in Bronx County
Commission Expires March 30, 1978

POST 65
GALVESTON

January 23, 1976

Mr. T. M. Newton, Engineer
Railroad Commission of Texas
Transportation Division
Capital Station
P.O. Box EE
Austin, Texas 78711

Dear Sir:

Please find enclosed Railroad Injury and Illness Summary as well as Highway Grade Crossing and Rail Equipment Reports for the month of December, 1975.

Sincerely yours,

R. L. Pippin
Safety & Fire Prevention
Supervisor

RLP/cet
Enc.

Exh "A"

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION
Capitol Station - P. O. Drawer 12967
Austin, Texas 78711
(512) 475-4594

BEST COPY AVAILABLE

RAILROAD INJURY AND ILLNESS SUMMARY

SHEET 1 OF 1

1 NAME OF REPORTING RAILROAD	2 ALPHABETIC CODE	3 REPORT MONTH	4 STATE ALPHABETIC CODE	5 COUNT
BOARD OF TRUSTEES OF THE GALVESTON W HARVES	G.W.F.	Dec. 1975	TX	Galveston

6.

I, R.L. PIPPIN, (Name of affiant), being first duly sworn, do say upon my oath that

I am SAFETY & FIRE PREVENTION SUPERVISOR (Title of Office held by affiant) of the railroad aforesaid and as such officer of the said railroad it is my duty to have supervision over the record of reportable incidents arising from the operation of the said railroad, and that I have caused to be compiled from the said record and to be carefully examined the annexed report of such incidents occurring during the month named at the head of this sheet; and that the said report is true and complete to the best of my knowledge and belief.

Subscribed and sworn to before me, a notary public in and for the State and County aforesaid, this 23 day of January, 19 76

(Use an impression seal) [L.S.]

(Notary Public) (Signature of Affiant)

Notary Public in and for Galveston County, Texas

7. LOCOMOTIVE MILES DURING MONTH

a. LOCOMOTIVE TRAIN MILES	b. MOTOR TRAIN MILES	c. YARD SWITCHING MILES	d. TOTAL
		3648	3643

8.

a. EMPLOYEE MANHOURS WORKED	b. PASSENGER TRAIN MILES OPERATED	c. NUMBER OF PASSENGERS TRANSPORTED
53,742	n/a	n/a

9. CASUALTIES (If additional space is required, use continuation sheet, Form 6012.)

a. INCIDENT NUMBER	b. TYPE PERSON OR JOB CODE	c. INJURY OR ILLNESS CODE	d. OCCURENCE CODE	e. AGE	f. NUMBER OF DAYS AWAY FROM WORK	g. NUMBER OF DAYS OF RESTRICTED ACTIVITY	h. CASES WITHOUT LOST WORK DAYS	i. STATE ALPHABETIC CODE
8928	A-34	702	916	42	-0-		x	TX
8929	A-92	915	916	37	P-2			TX
8930	A-42	702	901	47	P-14			TX
8931	A-7	302	909	44	P-5			TX
8933	A-120	703	919	57	P-90			TX
8934	A-120	203	919	45	-0-		x	TX

RECEIVED
JAN 29 1976
RAILROAD COMMISSION

6011

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION
Capitol Station – P. O. Drawer 12967
Austin, Texas 78711
(512) 475-4594

HIGHWAY GRADE CROSSING INCIDENT REPORT

1. NAME OF REPORTING RAILROAD: BOARD OF TRUSTEES OF THE GALVESTON WHARVES — Amtrak: | Train: X
1a. Alphabetic Code: G.W.F.
1b. Railroad Incident No.: 2461
2. NAME OF OTHER RAILROAD INVOLVED IN TRAIN INCIDENT: n/a
2a. Alphabetic Code: n/a
2b. Railroad Incident No.: n/a
3. NAME OF RAILROAD RESPONSIBLE FOR TRACK MAINTENANCE (single entry): Chicago, Rock Island & Pacific Portland
3a. Alphabetic Code: RI
3b. Railroad Incident No.: n/a
4. U.S. DOT-AAR GRADE CROSSING IDENTIFICATION NUMBER: N/A
5. DATE OF INCIDENT: month 1 2 | day 1 1 | year 7 5
6. TIME OF INCIDENT: am [ ] pm [X]

LOCATION

7. NEAREST RAILROAD STATION: Galveston
8. COUNTY: Galveston
9. STATE (two letter code): TX
10. CITY (if in a city):
11. HIGHWAY NAME OR NUMBER (if private crossing, so state): 37th Street

INCIDENT SITUATION

HIGHWAY USER INVOLVED

12. TYPE (1. Auto, 2. Truck, 3. Truck-Trailer, 4. Bus, 5. School Bus, 6. Motorcycle, 7. Pedestrian, 8. Other (specify)): CODE 7
13. SPEED (estimated mph at impact): 2 mph
14. DIRECTION (geographical) (1. North, 2. South, 3. East, 4. West): CODE 2
15. POSITION (1. Stalled on crossing, 2. Stopped on crossing, 3. Moving over crossing): CODE 3

RAILROAD EQUIPMENT INVOLVED

16. EQUIPMENT (1. Train (units pulling), 2. Train (units pushing), 3. Train (standing), 4. Car(s) (moving), 5. Car(s) (standing), 6. Light loco(s) (moving), 7. Light loco(s) (standing), 8. Other (specify)): CODE 4
17. POSITION OF CAR/UNIT IN TRAIN: 13 — CODE 13
18. CIRCUMSTANCE (1. Train struck highway user, 2. Train struck by highway user): CODE 1

19. Was the highway user and/or rail equipment involved in the impact transporting hazardous materials? 1. Highway user 2. Rail equipment 3. Both 4. Neither: CODE 4

ENVIRONMENT

20. TEMPERATURE (specify °F or °C): 65 °F
21. VISIBILITY (single entry) (1. Dawn, 2. Day, 3. Dusk, 4. Dark): CODE 4
22. WEATHER (single entry) (1. Clear, 2. Cloudy, 3. Rain, 4. Fog, 5. Sleet, 6. Snow): CODE 1

TRAIN AND TRACK

23. TYPE OF TRAIN (1. Freight, 2. Passenger, 3. Mixed, 4. Work, 5. Yard/Switching, 6. Light Locomotive(s)): CODE 5
24. TRACK TYPE USED BY TRAIN INVOLVED (1. Main, 2. Yard, 3. Siding, 4. Industry): CODE 2
25. TRACK NUMBER OR NAME: RI Track #15
26. FRA TRACK CLASSIFICATION: 1
27. NUMBER OF LOCOMOTIVE UNITS: 0
28. NUMBER OF CARS: 13
29. TRAIN SPEED (recorded speed, if available): 4 MPH — Est: X — Recorded:
30. TIME TABLE DIRECTION (1. North, 2. South, 3. East, 4. West): CODE 2

CROSSING WARNING

31. TYPE (place X in appropriate box(es)):
1 [ ] Gates; 2 [ ] Cantilever FLS; 3 [ ] Standard FLS; 4 [ ] Wig Wags; 5 [ ] Hwy.-Traffic Signals; 6 [ ] Audible; 7 [X] Crossbucks; 8 [X] Stop Signs; 9 [ ] Watchman; 10 [X] Flagged by crew; 11 [ ] Other (specify); 12 [ ] None

32. SIGNALED CROSSING WARNING — Was the signaled crossing warning identified in item 31 operating? (1. Yes, 2. No): CODE n/a
33. LOCATION OF WARNING (1. Both sides, 2. Side of vehicle approach, 3. Opposite side of vehicle approach): CODE 1
34. CROSSING WARNING INTERCONNECTED WITH HIGHWAY SIGNALS (1. Yes, 2. No, 3. Unknown): CODE 2
35. CROSSING ILLUMINATED BY STREET LIGHTS OR SPECIAL LIGHTS (1. Yes, 2. No, 3. Unknown): CODE 1

MOTORIST ACTION

36. MOTORIST PASSED STANDING HIGHWAY VEHICLE (1. Yes, 2. No, 3. Unknown): CODE n/a
37. MOTORIST DROVE BEHIND OR IN FRONT OF TRAIN AND STRUCK OR WAS STRUCK BY SECOND TRAIN (1. Yes, 2. No, 3. Unknown): CODE n/a
38. MOTORIST (1. Drove around or thru the gate, 2. Stopped and then proceeded, 3. Did not stop, 4. Other (specify), 6. Unknown): CODE n/a
39. VIEW OF TRACK OBSCURED BY (primary obstruction) (1. Permanent structure, 2. Standing railroad equipment, 3. Passing train, 4. Topography, 5. Vegetation, 6. Highway vehicles, 7. Other (specify), 8. Not obstructed): CODE 8

HIGHWAY VEHICLE PROPERTY DAMAGE/CASUALTIES

40. HIGHWAY VEHICLE PROPERTY DAMAGE (est. dollar damage): n/a
41. DRIVER WAS (1. Killed, 2. Injured, 3. Uninjured): CODE n/a
42. WAS DRIVER IN THE VEHICLE? (1. Yes, 2. No): CODE n/a
43. TOTAL NUMBER OF OCCUPANTS KILLED: 0
44. TOTAL NUMBER OF OCCUPANTS INJURED: 1
45. TOTAL NUMBER OF OCCUPANTS (includes driver): n/a
46. IS A RAIL EQUIPMENT INCIDENT REPORT BEING FILED? (1. Yes, 2. No): CODE 2

47. TYPED NAME AND TITLE: R.L. Pippin
SAFETY & ERR... PREVENTION SUPERVISOR
6010
48. SIGNATURE: R.L. Pippin
49. DATE: January 23, 1976

PORT OF GALVESTON
TOTAL OPERATING PORT

April 21, 1976

Mr. George Rothman
Frota Oceanica Brasiliera
No. 110 Venezuela Avenue
Rio De Janeiro, Brazil

Dear Mr. Rothman:

The Port of Galveston is extremely interested in petrochemical, drilling and other developments in the State of Amapa and the area near Iquitos. I discussed the matter with Kenneth Keller and Kep suggested that a note to you would be in order.

Our consultants recently performed a projection for us and strongly suggest that the East Coast South American Trade offers best growth potential for Galveston. With your "El Figuerido" operation in view, we believe that Galveston could support another vessel liner operation to the area and offer our port for your consideration.

I am pleased to enclose our brochure and Annual Report issue of our magazine to give you an update on Galveston's activities. Should you desire further information, please advise.

Very truly yours,

Charles M. Ferguson

CMF:tu
Enc.

cc: Mr. Kenneth Keller
277 Broadway
New York, New York

RECEIVED
APR 1976
KENNETH KELLER, ESQ.

Ck "B"

Charles M. Ferguson, District & Project Sales Manager

Galveston Wharves / 370 Lexington Avenue / New York, N. Y. 10017 / Telephone (212) 683-9090

PORT OF GALVESTON

April 7, 1976

Mr. Walter Gainsbury
Director
Compagnie Navigacion
Maritima de Netumar
26th Floor
67 Broadway
New York City, New York 10005

Dear Mr. Gainsbury:

As per our conversation with Mr. Heller, and Mr. Heller's conversations with you relative to Galveston. May we come to your office at your convenience to discuss business possibilities for liner service at our Port. Thank you for your consideration, and I look forward to your earliest advice.

Very truly yours,

Charles M. Ferguson

CMF:tu

bcc: Mr. Kenneth Heller
277 Broadway
New York City, New York

RECEIVED
APR 9 1976

Charles M. Ferguson, District & Project Sales Manager

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

KENNETH HELLER being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 277 Broadway, NY NY

Check Applicable Box

XXX Affidavit of Service By Mail — On September 8, 1976 deponent served the within Affidavit in Opposition to motion upon Henry W. Herbert, attny for Chicago Rock at 466 Lexington Ave, NY NY and Cichanowicz & Callan, attnsy for Frota at 60 Broad St. NY NY in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on September 8, 1976

.....
The name signed must be printed beneath

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT O F NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

76 Civ. 3050 (LPG)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STARKEISER da SILVA MATOS PIRES, being duly sworn, deposes and says:

I am the plaintiff in the within action, am 22 years of age and reside in New York with my wife, Virginia, and our infant son, Jeffrey, who is now one year old.

1. I was injured on December 11, 1975 in Galveston, Texas, when my right leg was amputated by a railroad car, Rock Island #15, while I was crossing 37th Street, a public highway, at approximately 8:50 p.m.

I was ordered by a superior officer on the ship to take 37th Street to town rather than any other street and this was why I was injured.

2. My wife is presently in New York to take care of me while I am an outpatient at the Rusk Pavilion where they are attempting to rehabilitate me and furnish me with a proper artificial leg because my right leg was amputated above the knee. The artificial leg given to me on the day I left Galveston, Texas, is

obsolete, outdated and is considered to be at least 30 years behind the one being prepared for me by Rusk Institute.

3. I discharged my attorneys in Galveston because of four reasons:

a) Because they represented my employer in addition t o myself and I thought that if they had to make a decision which affected both of us, I would be the loser;

b) they did not seem to be competent in handling my case;

c) they kept asking me about my racial background. For example, were any of my ancestors black since I appeared too light to be a Brazilian;

d) they were not interested in my being rehabilitated; all they wanted was that I should accept $80,000 in settlement because of my leg and that I go home.

4. I will not, under any circumstances, ever go to Galveston again. No one can force me to go there. I still suffer from nightmares about that place and there is no way short of immobilizing me that will compel me to go to Galveston, Texas, for any reason.

5. I stated that my wife and son are here in New York. We will remain here because we have visas for one year with the possibility of an extension. Also, recently, my infant son fractured his hip and he is in a New York City Hospital and will remain there for the next few months. Both my wife and I visit him there every day.

Sworn to before me

this 10th day of September, 1972

S. M. PIRES

The above affidavit has been read and translated to me from the English language to the Portuguese language and I understand and affirm that the contents are correct.

STARKEISER da SILVA MATOS PIRES

I, ROBERT BEYER, have translated the above affidavit from English to the Portuguese language for S. M. PIRES, and he has affirmed to me that he knows the contents therein to be true and correct.

ROBERT BEYER

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

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The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

Zillah Lawrence being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 430 West 24th Street, NY NY

Check Applicable Box

☒ Affidavit of Service By Mail — On September 13 1976 deponent served the within Affidavit upon Henry W. Herbert, attny for Chicago, Rock Island at 466 Lexington Ave., NY NY and Cyphano-Callan, attnys for the action at 80 Bread St., NY NY the attorney(s) in this action at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on September 13 1976

KENNETH HELLER
Notary Public, State of New York
Qual. in Kings Co. No. 24-4507925
Certificate filed in New York County
Commission Expires March 30, 1977

Zillah Lawrence
ZILLAH LAWRENCE
The name signed must be printed beneath

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs, 76 Civ. 3050 (LPG)

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

PLAINTIFF'S

MEMORANDUM OF LAW

POINT I

PLAINTIFF'S CHOICE OF FORUM SHOULD NOT BE DISTURBED

The rule is that unless the balance is strongly in favor of the defendant, plaintiff's choice of forum should not be disturbed. Gulf Oil Corporation vs. Gilbert, 330 U.S. 501 (1947), followed in Ford Motor Co. v. Ryan, 182 F. 2d 329 (2 Cir. 1959), cert. den. 340 U.S. 851.

The real test on a motion to transfer is fairness and the interests of justice. Beach v. National Football League, 331 F. Supp. 249 (SDNY 1971). There is no question here that

the equities are in favor of keeping this lawsuit in New York. The relative ability of litigants to bear expenses of trial in any particular forum will be considered in weighing what interests of justice should prevail. Keller-Dorian Colorfilm Corp. vs. Eastman Kodak Co., 88 F. Supp. 863, (SDNY 1949). Defendants can clearly better afford to defend this action than can plaintiff, an indigent Brazilian merchant seaman afford to go to Texas to prosecute this lawsuit.

In Lucas v. N.Y. Central RR Co., 88 F. Supp. 536, JUDGE IRVING KAUFMAN said, "It is the law that a movant for relief under 1404(a) must show a preponderant balance in his favor, for it is still only the exceptional case which merits relief under this section."

The law that the plaintiff's choice of forum should not easily be upset has more recently been underscored by Judge CROAKE in Blue Bell Inc. v. Jaymar Ruby, Inc., 311 F. Supp. 942(1969) where at page 942 the Court said: "...forum selected by a party should not be disturbed unless movant clearly demonstrates balance of convenience and justice weighs heavily for such transfer."

POINT II

THE MERE LISTING OF POSSIBLE WITNESSES WITHOUT DETAILING WHAT THE TESTIMONY WILL ENCOMPASS IS INSUFFICIENT TO WARRANT A TRANSFER PURSUANT TO 28 U.S.C.A. 1404(a)

The law is quite clear that if a party is claiming that the convenience of witnesses merits the transfer of a

case pursuant to 28 U.S.C.A. 1404(a), the moving party must set forth in an affidavit the substance of the evidence to which the witnesses are to testify. The mere listing of witnesses is insufficient to justify transfer. Clendenin v. United Fruit, 214 F. Supp. 137 (E.D. Pa. 1963). See also Carter v. U.S. Lines, 200 F. Supp. 707; Jenkins v. Wilson Freight Forwarding Co., 104 F. Supp. 422; Goodman v. Southern Ry Co., 99 F. Supp. 852.

POINT III

Medical records are as easily obtained in New York as they are in Texas.

In accordance with today's Court rules, medical records are obtainable by authorization and are marked as exhibits and admitted in evidence if certified. Clendenin v. United Fruit, supra.; DeMuraes v. American Export-Isbrandtsen Lines, Inc., 289 F. Supp. 861.

CONCLUSION

Defendants' motions to transfer this action to Texas should in all respects be denied.

Respectfully submitted,

KENNETH HELLER
Attorney for Plaintiffs

T 75—Affidavit of Personal Service—On Corporation.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PL. AT BROADWAY, N. Y. C. 10004

State of New York,

Court, County of NEW YORK

~~XXXXXX~~. 76 Civ. 3050 (LPG)

S. M. PIRES and VIRGINIA PIRES,

Plaintiff(s)

against

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendant(s)

Affidavit of Personal Service

State of New York,
County of NEW YORK } *ss.:*

KENNETH HELLER *being duly sworn,*

deposes and says that deponent is not a party to the action or proceeding, is over 18 years of age and resides at 277 Broadway, New York, New York 10007

That on the 8th *day of* September *19* 76 *at* approx. 10:30 p.m. deponent served the within Memo of Law in support of motion to transfer affidavit in opposition upon Henry W. Herbert, attnys for Chicago, Rocke tc at 466 Lexington Ave., ~~deponent served the within~~ NY NY and Cichanowicz & Callan, attnsy for Frota at 80 Broad Street, New York, New York

a corporation, *the defendant therein named, by delivering a true copy thereof to personally, the* ir offices at the addresses designated by said attorneys *of said corporation; deponent knew the said corporation so served to be the corporation mentioned and described as defendant therein and knew* atorneys for the parties hereto herein. *to be the*

Sworn to before me, this 8th *day of* September *19* 76

RICHARD BETLESKY
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires March 30, 19[illegible]

KENNETH HELLER
Print name beneath signature

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------x

S. M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs-Appellants,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants-Appellees.

----------x

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY THE TRANSFER OF THIS ACTION TO TEXAS

This Court has the right to treat this application in any way it sees fit in order to further the interests of justice. It can be treated as a proceeding for a "Writ of Mandamus" or, as an application for a permanent stay to prevent transfer, see Ex Parte Simons (1918), 247 U.S. 231;

> "The label attached to the petition, whether mandamus, prohibition or certiorari, should be unimportant, as long as the relief sought is set out."

POINT I

COURT BELOW ERRED IN DISMISSING PLAINTIFFS' CASE AGAINST FROTA OCEANICA BRASILEIRA, S.A. ON GROUNDS OF LACK OF JURISDICTION

The Court below, in its opinion, accepted plaintiff's verson of the occurrences in part, that the negligent order was given on board the vessel, but the court, in its opinion overlooked the fact that it was the plaintiff's superior who gave the order directing the specific route for the benefit of the bessel since plaintiff-seaman had to return to his vessel quickly. The Court stated in its opinion, Page 3:

> ...Arguably, the alleged tort of failure to instruct on a safe means of egress, having occurred on the defendant's ship, meets the locality requirement for jurisdiction."

The Court below erred because plaintiff-seaman's affidavit stated as follows:

> "I was ordered by a superior officer on the ship to take 37th Street to town rather than any other street and this was why I was injured."

A dismissal of this action fails to take into consideration the traditional maritime activity in which plaintiff-seaman was engaged, i.e. shore leave.

POINT II

THE LOWER COURT DISMISSAL WAS ERRONEOUS IN VIEW OF A LINE OF CASES SIMILAR TO THIS ONE

It is clear that the lower court failed to consider the line of cases from this circuit, such as Kyriakos v. Goulandris, 151 F. 2d 132 (1945), cited in plaintiffs' first

Memorandum of Law and the cases which follow it, holding that a negligent act which begins on vessel and culminates ashore is still with "maritime flavor", providing that the parties were engaged in "Traditional Maritime activities", the case herein.

POINT III

COURT BELOW ERRED IN COMPELLING MAINTENANCE OF MULTIPLE ACTIONS

The dismissal of the action against defendant, FROTA, requires the maintenance of multiple actions. Since the action against FROTA was dismissed the action against Defendant, ROCK ISLAND, should have been dismissed; to keep one and dismiss another compels multiple actions in different courts.

Plaintiffs' original brief to the lower court in support of the motion to remand spells out the basis for dismissal on a lack of jurisdiction of both actions, or a remand to the State Court. The lower court chose to sever one action from another; this was in error. The action against ROCK ISLAND should have been dismissed for lack of jurisdiction since it was coupled with the action against FROTA.

POINT IV

A TRANSFER OF FROTA IS CONTRARY TO EXISTING CASE LAW SINCE FROTA IS NOT PRESENT IN TEXAS

Defendant FROTA has a general agent in New York. It is present in New York. FROTA has no office or general agent in Texas. FROTA can be served in New York, but not in

Texas. Hoffman v. Blaski, 363 U.S. 335 (1960) cited by the court holds that if the action could not originally have been commenced against defendant FROTA in Texas. It cannot be transferred, therefore it follows that since there was a dismissal, defendant ROCK ISLAND should be carried with FROTA.

POINT V

THE CONVENIENCE OF PARTIES AND WITNESSES CAN BE BEST SERVED BY MAINTENANCE OF THE ACTION IN NEW YORK. THIS WAS PLAINTIFFS' FREE CHOICE OF FORUM

Plaintiff's right to choose the forum is entitled to the highest consideration, and it matters not that the plaintiff is not a resident of that forum. In Goodman v. Southern Ry Co., 99 F. Supp. 852 (S.D.N.Y. 1951), Judge Kaufman laid down the following rule:

> "It has, however, definitely been settled in this district, that the balance of convenience must be strongly in favor of the defendant before the plaintiff's choice of forum will be disturbed. Ford Motor Co. v. Ryan, 2 Cir., 182 F. 2d 329. See also Dolly Toy Co. v. Bancroft-Rellim Corp., 97 F. Supp. 531, decided by this Court in May, 1951; Perry v. Atchison, T & S.F. Ry Co., D.C. N.D. Cal., 82 F. Supp. 912; Skultety v. The Pennsylvania Railroad Co., D.C.S.D.N.Y., 91 F. Supp. 118. Judge Learned Hand, concurring in Ford Motor Co. v. Ryan, emphasized additionally the privilege granted the plaintiff in selecting a forum, and his decision to confirm the lower court's denial of the motion to transfer rested solely upon the weight he attached to this privilege." (99 F. Supp. at 854) (emphasis added).

There are at present no eye witnesses to this accident in Texas.

Employees of the City of Galveston were 400 ft. from the site of the accident at the other end of the train. The railroad yard was in complete darkness when plaintiff-seaman 's accident occurred.

The only eye witnesses were the three Brazilian seamen presently employed on board vessels which call at East Coast U.S. ports and all over the world; not in Texas.

This jurisdiction is more convenient to all the eye witnesses than is Texas. In fact, as stated, one eye witness crew member calls at East Coast ports every 30 days.

The Court thrice erred when it stated:

> "...Majority of the witnesses are in Texas."

First, the individuals named by defendant and employed by the City of Galveston are not witnesses.

Second, the Brazilian crew members are not in Texas.

Thirdly, it is not the quantity of witnesses which matters, it is the quality and materiality of their testimony.

The burden is on the moving party to set forth the substance of the witnesses' testimony, and show how it is material to the action. This was not done by the moving party below. They have not demonstrated the subtance of what information they wish to elicit from each witness named, nor have they demonstrated the materiality of the witnesses' testimony.

Proof of this type and nature is a prerequisite to a removal. Judge Kaufman of this court in Peyser v. General Motors Corporation, 158 F. Supp. 526, 529 (S.D.N.Y. 1958) stated:

> "Thus more is required of the movant than the mere assertion that it may call a designated number of witnesses at the trial. Of greater importance to a judge in determining a motion of this type is the materiality of the matter to which these witnesses will testify. National Tea Company v. The Marseille, D.C.S.D.N.Y. 1956, 142 F. Supp. 415, 416; Jenkins v. Wilson Freight Forwarding Co., D.C.S.D.N.Y. 1952, 104 F. Supp. 422, 424; Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., D.C.S.D.N.Y. 1949, 88 F. Supp. 863, 866."
>
> "The movant should endeavor to provide the court with a list of its principal witnesses and their locations, along with a brief statement of the matter to which it is anticipated they will be called upon to testify." (Emphasis added)

To the same effect is Chicago, Rock Island & Pacific R.R. Co. v. Hugh Breeding, Inc., 232 F. 2d 584, 588 (10th Cir. 1956); Strypek v. Schreyer, 118 F. Supp. 918, 919 (S.D.N.Y. 1954); Schmidt v. American Flyers Airline Corp., 260 F. Supp. 813, 814 (S.D.N.Y. 1966); Toti v. Plymouth Bus Company, 281 F. Supp. 897, 898 (S.D.N.Y. 1968); Development Co. of America v. Insurance Co. of No. America, 249 F. Supp. 117, 118 (D. Md. 1966) and Carter v. United States Lines Company, 200 F. Supp. 707, 708 (S.D.N.Y. 1961).

Within our heading above, we must direct the Court's attention to the fact that the site of the accident occurring in Galveston should have no bearing upon the choice of the forum. The fact that the site of the injury itself is a factor of no consequence. Cooper v. Valley Line Company, 320 F. Supp. 483, 485 (W.D. Pa. 1970) ("The occurrence of the accident at McMehen, West Virginia, presents no compelling reason to transfer in the circumstances of this case."); Oltman v. Currie, 231 F. Supp. 654, 655 (E.D.S.C. 1964); Bush v. United Air Lines, 148 F. Supp. 104, 105 (S.D.N.Y. 1956)("The fortuitous circumstances that this accident occurred through collision with a mountain in Wyoming should not operate to deprive the plaintiff of her choice of forum.").

The convenience of counsel to the jurisdiction, especially a counsel upon whom a foreign seaman, not speaking the English language, can rely is of most importance in deciding the forum. In our matter, we must keep in mind that plaintiff-seaman finally discharged his original counsel because plaintiff realized that he was merely being used to enhance a business relationship with the vessel's insurer so as to guarantee further business to this firm of lawyers; that situation does not exist at this time.

Many other courts have also considered the residence and convenience of expert witnesses and counsel to be of high significance: Altman v. Deramus, 342 F. Supp. 72, 76

(S.D.N.Y. 1972); Foster v. United States Lines Company, 188 F. Supp. 389, 391 (S.D.N.Y. 1958); Robbins Music Corp. v. Alamo Music, 119 F. Supp. 29, 30 (S.D.N.U. 1954); Cooper v. Valley Line Company, 320 F. Supp. 483, 485 (W.D. Pa. 1970); Legg v. Pittsburgh & Lake Erie Co., 186 F. Supp. 73, 74 (W.D. Pa. 1960); Standard v. Stoll Packing Corporation, 210 F. Supp. 749, 750 (M.D. Pa. 1962), appeal dismissed, 315 F. 2d 626 (3rd Cir. 1963); Davis v. American Viscose Corporation, 159 F. Supp. 218, 220 (W.D. Pa. 1958).

With regard to the convenience of the transfer of forum insofar as medical experts and medical records are concerned:

In Galveston, the medical treatment rendered was merely corrective. It corrected the traumatic amputation; this can be presented by the printed page.

On the other side of the coin, we have plaintiff receiving rehabiliation treatment here with the preparation for him to receive the latest prosthetic device, invented by the Rusk Rehabilitation Institute. Testimony to elicit plaintiff's response, or lack of response, to that treatment cannot be presented on a printed page. To deprive plaintiff-seaman of the testimony of his rehabilitation doctor, Dr. Dong Sun Chu, from the Rusk Institute will sorely inconvenience him.

We are well aware of the fact that with every severe trauma we may well have a psychic trauma and, in our case, plaintiff exhibits, among other sequelae, an enormous phobia

against returning to the City of his trauma, Galveston. He is undergoing treatment here in New York and Dr. Savitsky, his physician, resides here. Again, to transfer will deprive him of the testimony of a second expert witness. (Ex. I)

Plaintiff has previously cited a sequence of cases which pertain to the weight to be given to the presence of expert witnesses in this forum as a countervailing argument to transfer. Plaintiff will not repeat them; they are present on Pages 7 & 8, commencing with Altman v. Deramus, supra.

At this point, under this argument, we must now point out the effect upon the plaintiff-seaman of the transfer of forum as against the effect on Defendant ROCK ISLAND.

In order to effectively understand what a transfer would mean to plaintiff-seaman as against defendant ROCK ISLAND, we must consider the following:

Pires does not speak English, not one word.

Pires is totally indigent. He is being supported by maintenance and cure paid to him while he is being rehabilitated in New York.

Pires cannot care for himself. He needs to be in a hospital, or be taken care of by his wife.

Pires is being rehabilitated here, not in Texas. For him to travel, he will lose what he has gained here and what he is looking forward to receive, a modern artificial prosthetic device which will allow him to walk.

Pires is suffering from severe phobia. In view of Dr. Savitsky's report, the only way he will go to Texas is under extreme sedation which will effectively destroy his initiative and reduce him to the level of an incomprehensible child.

Pires' wife and infant child, 11 months old, reside in an apartment in New York.

Pires' child has sustained a fractured hip and pelvis and is still in body cast.

How can we balance this as against one day's inconvenience to take the testimony of whatever witnesses defendant ROCK ISLAND wished to produce in Texas by way of deposition.

Court below erred in failing to properly balance the convenience of the removal between the parties.

POINT VI

COURT BELOW ERRED IN GIVING WEIGHT TO THE FACT THAT AN ACTION AGAINST ONE DEFENDANT WAS PENDING IN GALVESTON, IN CONSIDERING TRANSFER

Plaintiff's free choice of residence and forum was not Galveston but is the City of New York and the courts of New York.

The action was commenced in Galveston not because plaintiff was given any alternative choice; it was because he did not freely choose or contract his attorney.

The manner as outlined in plaintiff-seaman's

affidavits attached to this Memorandum of Law, and as set forth in my affidavit, deprived plaintiff-seaman of a free choice of attorneys and, consequently, of forum.

Plaintiff, as a seaman, is admittedly a "Ward of Admiralty", but in view of the circumstances here, there is even a greater burden upon this court to scrutinize every transaction plaintiff has made and the contingency agreements he made between himself and his former attorneys, Exhibits & , and the circumstances surrounding these agreements are such as to show to this court that plaintiff was deprived of his free choice of attorneys and of forum. Had this plaintiff-seaman been an American seaman, English speaking, with long sea experience and prior history of claims, etc., even then under those circumstances this Court is duty bound to examine any contract he made with greatest care.

Here we have a Brazilian seaman, suffering a severe trauma, 22 years of age, less than one year at sea, never having been in Port of Galveston, friendless, was ordered by the Master of his vessel to comply with a request made to him by this attorney, Mr. Bunce. This contract and its subsequent results are entitled to the greatest and most careful examination as to all aspects. See Garrett v. Moore McCormack Lines, 317 U.S. 239, which quoted the opinion of Justice Story in Harden v. Gordon, F. Case No. 6047 (CC Me 1823):

> "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending toward them a peculiar protecting favor and guardianship. They are emphatically the wards of admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians and cestuis que trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transactions, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable."

The wardship Theory for seamen was still applicable and cited in Blanco v. Phoenix Co. de Nagecacion, 304 F. 2d 13 (1962), and Flener v. Waterways Oil Co. 261 F. Supp. 740 (1966).

In view of the fact that the lower court relied heavily in its opinion on the existence of another action

against another defendant when it said:

> "There is strong policy favoring litigation of related claims in the same tribunal."

Plaintiff did not freely choose that tribunal, or that forum -- it was chosen for him, as were the attorneys chosen for him. This forum is clearly one of his own choosing and it is his decision to remain in this forum, in view of the circumstances surrounding his contracting with attorneys who chose the forum to suit not the convenience of the plaintiff, but to suit their major clients.

This court has the opportunity to right a wrong committed against an indigent, unsophisticated, foreign seaman, who suffered one of the most severe injuries a man can suffer, the loss of a major portion of his body.

Transferring this action based upon the existence of the other action not freely brought would most certainly be inimical to the interests of a seaman and in derrogation of Garrett v. Moore McCormack Lines, supra, and cases that follow its holding.

POINT VII

CASES CITED IN SUPPORT OF THE LOWER COURT DECISION ARE IN ERROR

To distinguish the cases cited by the lower court in support of its dismissal of defendant FROTA on basis of jurisdiction, we only have to examine the facts of each case.

Gowdy v. United States, 412 F. 2d 525 (6th Cir.), cert denied, 396 U.S. 960 (1969) is a fall from land on to land. Crosson v. Vance, 484 F. 2d 840 (4th Cir. 1973) is an injury occurring on navigable waters which failed the test of "Traditional Maritime activities."

Respectfully submitted,

KENNETH HELLER
Attorney for Plaintiffs-
Appellants

ELIAS SAVITSKY, M. D.
141 EAST 55TH STREET
NEW YORK, N. Y. 10022

PL 5-1195

September 3, 1976

Kenneth Heller, Esq.
277 Broadway
New York, New York 10007

Re: Starkeiser Matos Pires
Inj: 12/11/75

Dear Sir:

I examined the above-named on 8/30/76. This 22 year old married man, a merchant seaman, was injured when he wasstruck by a train. Sustained severe injury to the right lower extremity, with extensive lacerations, fractures of the foot, avulsion of the distal portion, right foot. Also sustained severe lacerations of left thigh. He was hospitalized and an above knee amputation of the right lower was performed, together with extensive debridement of the left lower. Patient remained in the hospital for about three months. The hospital record indicates that he suffered from fluctuating moods, intermittent irritability during this time. The patient himself stated that he felt depressed throughout his stay in the hospital. After discharge, patient came to New York for rehabilitation. He was fitted with a new prosthesis and has been undergoing further rehabilitation.

Residual Symptomatology: Considerable improvement reported. Chief complaints refer to the following:

1. Persistent irritability and easy arousal of anger. This has resulted in a strain in the marital relationship.

2. Headaches, which occur in association with emotional tension. Patient has shown diffuse anxiety since the accident. He is easily upset by noises, rapid movements in the environment. There are marked phobic anxieties related to the scene of the accident, Galveston. These are expressed in his dreams as well. Irritability has been noted. Patient reports concomitants of a depressive state in terms of feelings of sadness, loss of zest, interest. This has led to diminution of sexual interest as well, another factor in the state of marital distress. Energy level has shown diminution. Patient complains of poor memory and slight difficulty in concentration capacity. Sleep has been poor, with restless qualities. Anxiety dreams having a traumatic nature reported; no night sedation taken regularly. Appetite has been fair; mouth noted to be dry, five pound loss since accident. Occasional diarrhea reported. No undue deviation in intake of alcohol, tobacco, drugs. Patient reports persistent pain in the stump and remainder of the leg, as well as in the other. Phantom limb sensations noted, involving a sensation of pain in the toes of the right foot.

Past History: No prior accident; has had several attacks of renal stones no surgical intervention noted. There is no history of other surgical intervention, nor of nervous or mental disease. Patient was born in Brazil, was always in good health. He had fourteen years of schooling and since leaving school has been in the merchant marines, with satis-

Exh. I

factory work adjustment. He has been married for three years; marital adjustment described as satisfactory prior to accident.

Examination: Patient was accompanied at the interview by a professional interpreter. He was noted to be neatly dressed, fairly alert, somewhat preoccupied and sad in appearance. He established good contact and was fairly well related, within limitations of the language barrier. Speech appeared smooth; no evidence elicited of trend reactions, other psychotic material; sensorium clear. The depressive symptoms noted above were expressed easily, upon direct questioning. No evidence elicited of suicidal impulses.

Brief review of motor and sensory status showed no gross focal weakness or sensory alteration suggestive of conversion syndrome. Deep reflexes were not elicited.

Opinion: Patient sustained serious injury as noted above. He manifested depressive feelings after trauma. The problems of communication might well have impaired an accurate assessment of these feelings. At this time he shows a fairly well defined anxiety reaction with depressive and phobic features. Diagnosis would be anxiety reaction, post-traumatic, with depressive and phobic features.

Management would involve chemotherapy, systematic contacts with a person who can speak to him in his language. I am prepared to initiate psychiatric treatment at this time. In view of the patient's progress in rehabilitation and the significant phobic anxiety related to the scene of accident, the various therapeutic measures suggested should be continued in his current environment. Transfer would mobilize additional anxieties, and possibly require coercive measures, which are undesirable. Systematic rehabilitation should be continued. Family involvement may be necessary. Prognosis is fair; somewhat guarded due to significant anxiety components in the picture. Patient has a continued disability, which is causally related to the accident of 12/11/75.

Very truly yours,

Elias Savitsky, M.D.

ES/mg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT O F NEW YORK

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

---

76 Civ. 3050 (LPG)

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

STARKEISER da SILVA MATOS PIRES, being duly sworn, deposes and says:

I am the plaintiff in the within action, am 22 years of age and reside in New York with my wife, Virginia, and our infant son, Jeffrey, who is now one year old.

1. I was injured on December 11, 1975 in Galveston, Texas when my right leg was amputated by a railroad car, Rock Island #15, while I was crossing 37th Street, a public highway, at approximately 8:50 p.m.

I was ordered by a superior officer on the ship to take 37th Street to town rather than any other street and this was why I was injured.

2. My wife is presently in New York to take care of me while I am an outpatient at the Rusk Pavilion where they are attempting to rehabilitate me and furnish me with a proper artificial leg because my right leg was amputated above the knee. The artificial leg given to me on the day I left Galveston, Texas, is

Exh II

obsolete, outdated and is considered to be at least 30 years behind the one being prepared for me by Rusk Institute.

3. I discharged my attorneys in Galveston because of four reasons:

a) Because they represented my employer in addition t o myself and I thought that if they had to make a decision which affected both of us, I would be the loser;

b) they did not seem to be competent in handling case;

c) they kept asking me about my racial background. For example, were any of my ancestors black since I appeared too light to be a Brazilian;

d) they were not interested in my being rehabilitated; all they wanted was that I should accept $80,000 in settlement because of my leg and that I go home.

I will not, under any circumstances, ever go to Galveston again. No one can force me to go there. I still suffer from nightmares about that place and there is no way short of immobilizing me that will compel me to go to Galveston, Texas, for any reason.

5. I stated that my wife and son are here in New York. We remain here because we have visas for one year with the possibility of an extension. Also, recently, my infant son fractured his hip and he is in a New York City Hospital and will remain there for the next few months. Both my wife and I visit him there every day.

Sworn to before me
this 16th day of September, 1972

STARKEISHA MATTHEWS PRICE
S. M. Price

UNITED STATES DISTRICT COURT

SOUTHERN DISTIRCT OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

76 CIV. 3050 (LFM)

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

KENNETH HELLER, being duly sworn, deposes and says:

I am an attorney at law of the State of New York, attorney for the plaintiffs herein and am fully familiar with all the pleadings and proceedings heretofore had herein.

This affidavit is made in opposition to defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO.'s second motion to remove the amend action under 28 U.S.C.A. 1404(a), and it is also made in oppositic to defendant, FROTA OCEANICA BRASILEIRA, S.A.'s motion under Rule 12b of the Federal Rules of Civil Procedure and also under 28 U.S.C.A. 1404(a).

At present, plaintiff has an action pending brought by this alien plaintiff against an alien defendant, FROTA OCEANICA BRASILEIRA, S.A. joined with a United States citizen defendant, CHICAGO ROCK ISLAND & PACIFIC R.R. CO.

This court has no jurisdiction over the present action as

described because there is no complete diversity of citizenship between plaintiff and both defendants.

Based upon the procedure as set forth in Romero vs. International Terminal Operating Co., 358 U.S. 354, and the opinion delivered by Mr. Justice Frankfurter, the first matter which must be decided by this Court is jurisdiction. As indicated in 358 U.S. Page 374, a determination of whether or not this Court has jurisdiction must be undertaken first because if the Court does not have jurisdiction, the Court can no longer act to consider any other matters raised by either of the defendants.

With regard to the motion to remove this matter to the District Court in Galveston, since this District Court has no jurisdiction the Court cannot remove this matter to Galveston because removal presupposes that the Court does in fact have jurisdiction to issue such an order to remove the matter.

An action pending in Galveston does not involve the same parties or not even the same subject matter. Nevertheless, the lack of jurisdiction in and of itself would defeat removal from that District Court to Galveston, Texas.

With regard to defendant, FROTA OCEANICA BRASILEIRA, S.A., and the matter of availability for service of defendant FROTA which is raised by Mr. Henry W. Herbert in his second motion to remove the matter, dated August 27, 1976, removal must be denied because FROTA OCEANICA BRASILEIRA, S.A., being an alien shipping company, Brazilian Flag, is not amenable to process in Galveston. (See Hoffman vs. Blaski, 363 U.S. 335). Their general agent, OMNIUM AGENCIES, only exists here in New York, and the fact that a negligent

action was committed on board a vessel between the plaintiff and the shipowner does not give jurisdiction to any Texas Court under any so-called Texas "long arm" statute.

A search of Vernon's Annotated Texas Statutes, Article 2031(Sections 3 & 4, and the cases cited under them do not disclose one single case where the Texas "long arm" statute allowed service of process by an alien against an alien defendant for a negligent act committed on a Brazilian Flag vessel. It is hornbook law that a matter cannot be removed to another jurisdiction if the plaintiff did not have an absolute right to commence an action in that jurisdiction at any time if defendant is amenable to service of process. Hoffman vs. Blaski, supra.

For the defendant, CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. to say that the plaintiff could resort, might resort, or possibly can resort to a statute which does not grant plaintiff a right of action against defendant FROTA OCEANICA BRASILEIRA, S.A. is no legal basis for this case to be removed to Texas.

FROTA OCEANICA BRASILEIRA, S.A.has not filed a certificate for doing business in Texas, does not have an office in Texas, does not have an agent in Texas, but they are present in New York. Removing this action by transferring it would in effect deprive plaintiff from suing FROTA and would cause a multiplicity of acti

You cannot remove an action if it could not have been originally brought in the district to which it is removed. Plaintiff's action against FROTA could not have originally been brough in Texas, therefore the entire action cannot be removed. It does

not fulfill the requirements of Hoffman vs. Blaski, supra.

Directing our attention to defendant FROTA OCEANICA BRASILEIRA, S.A.'s affidavit, a notice of motion under Rule 12b of the Federal Rules of Civil Procedure, your deponent must point out that the defendant put the cart before the horse. In other words, if this Court decides that it has no jurisdiction under 28 U.S.C.A. 1414(a), then theCourt never reaches the question of having to decide whether the complaint "states cause of action" under Rule 12b of the Federal Rules of Civil Procedure. In the event this Court does need 12b, the Court itself would decide that it has no jurisdiction to determine the 12b part of the motion.

With regard to the Federal Rules of Civil Procedure, 12b part of the defendant FROTA OCEANICA BRASILEIRA, S.A.'s motion, in the event the Court decides that it has no jurisdiction and the Court in contravention of the rules laid down in Romero vs. International Terminal Operating Co., supra, decidesthat it wants to take it upon itself to decide liability; then, even though plaintiff is entitled to a jury trial, this deponent must point out that this case on its own set of facts differs from all others cited in defendant FROTA's brief because, in this case, plaintiff, a 22-year old inexperienced seaman who never visited Galveston, Texas before, was directed by a superior officer to take a certain route to town for the benefit of the vessel, and this experienced ship's officer had been there before and knew full well the dangers and hazards of this route. We have reviewed and distinguished the cases in

the following manner:

In Todahl v. Sudden & Christenson, 5 F. 2d 462 (9 Cir.), the seaman was returning to the vessel, not leaving the vessel, and the route he took to return was not directed by a superior officer.

In Wheeler v. West India SS Co., 103 F. Supp. 631, plaintiff wasagain returning to the ship and no ship's officer selected the route.

In Robinson v. Northeastern Steamship Corp., 228 F. 2d 679 (2 Cir. 1956), again a crew member was returning to the vessel, not leaving it, and there were no instructions given by a superior to take a specific route.

In Farrell v. United States, 167 F. 2d 781 (2 Cir. 1948), a seaman was again returning to the ship and no ship's officer selected the route plaintiff should take.

In Paduano v. Yamashita Kisen Kabushiki Kaisha, 2 Cir. 221 F. 2d 615, this is a longshoreman's case; ours is a seaman's case, and curs is distinguishable on that basis.

In Trost v. American Hawaiian Steamship Company, 324 F. 2d 225 (2 Cir. 1963), the plaintiff in that action, an experienced ship's officer took a route of his own selection without being directed to take one, and the accident occurred some four miles from the ship, not a few hundred feet as in our case.

In Bates v. Prudential Grace Lines, Inc., 375 F. Supp. 774, aff'd. 497 F. 2d 900 (2 Cir. 1974), the seaman was not given any instructions as to the route to be taken and he fell into a hole, an enormous distance from the vessel.

In Aguilar v. Standard Oil Co. of New Jersey, 318 U.S. 724, (1943), plaintiff was struck by an automobile while returning to the vessel.

In Dangovich v. Isthmian Lines, Inc., 218 F. Supp. 235 (1963), plaintiff was returning to the vessel and was not under any direction by his superior officer to use a specific route.

Again, we reiterate we have a 22-year old seaman, injured at the Port of Galveston, who was instructed to take a specific route by his superior officer of the vessel when the officer knew full well the dangers that existed in the Port of Galveston and failed to inform the plaintiff.

Therefore, this matter should be remanded to the State Court on the grounds that this Court lacks jurisdiction or, if this Court retains jurisdiction, it should remain in this district because of:

a) Defendant, FROTA, is not present in Galveston, Texas, within the meaning of Hoffman v. Blaski, supra., and

b) Defendants have not sustained their burden of outweighing the plaintiff's choice of forum.

WHEREFORE, it is respectfully requested that plaintiff's be granted the relief requested and for such other and further relief as to this Court may seem just and proper.

KENNETH KELLER

Sworn to before me this
10th day of September, 1976

Notary Public

-6-

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF New York ss.:

Zillah Lawrence being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 430 West 24th Street, New York, New York

Check Applicable Box

☒ Affidavit of Service By Mail — On September 76 deponent served the within Affidavit in Opposition upon Hess, Henry, McNorton, Oppenheimer & Cohen, attorneys at 360 Lexington Av New York, New York and Cleveland, Waldman & Carton, attorneys for Dove Fluid attorney(s) for in this action, at 60 Broad Street, NY NY the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on September 19 76

Zillah Lawrence
ZILLAH LAWRENCE

HERBERT HELLER
Notary Public, State of New York
No. 31-0[illegible]
Qualified in [illegible] County
Commission Expires [illegible]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

76 CIV. 3050 (LPG)

REPLY AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH HELLER, being duly sworn, deposes and says:

I am an attorney at law of the State of New York, attorney for the plaintiffs herein and am fully familiar with all the pleadings and proceedings heretofore had herein.

This affidavit is made in reply to defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO.'s affidavit of its attorneymade September 13, 1976, delivered to me at 5:00 p.m. of that day, with a second affidavit of defendant's attorney accompanied by a Memorandum of Law, and also to the affidavit and Memorandum of Law received by plaintiff today from Mr. Victor Cichanowicz, attorney for defendant FROTA OCEANICA BRASILEIRA, S.A.

Defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., in Mr. Herbert's affidavit, again fails to overcome their burden of showing the urgency to remove this matter to Texas by producing the names

and proposed testimony of the witnesses which is material.

I now set forth the names of the train crew operating their train on defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO.'s right of way with defendant's railroad car which rode over plaintiff unlighted and unmarked public highway.

Mr. Pippin, the only name mentioned, was not on duty at the time of the accident. He investigated following the accident and made a report to the Texas State Railroad Commission in which he noted the owner of the right of way, CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. and of the railroad car CHICAGO, ROCK ISLAND & PACIFIC R.R. CO.

Plaintiff can only conclude from this failure of defendant to comply with all decisions requiring disclosure of the proposed witnesses, substance and materiality of testimony that defendant's claims of requirement of transfer to Texas are spurious.

Again plaintiff reiterates, it is not the quantity of the witnesses listed in an affidavit but the quality of their testimony that is important. Marcos Da Silva, presently employed on a vessel which calls every 30 days in the East Coast ports, includin New York, was the one of the three (3) Brazilians closest to plaintiff; in fact, the other two were talking to each other in back of him. He was an arm's length from plaintiff and had he not jumped back, he would have been struck and injured.

It is plaintiff's position that plaintiff, anon-white alien, latin seaman would not receive substantial justice in a personal injury action brought in the City of Galveston, against

the City of Galveston, from a jury composed of the residents of the City of Galveston.

I note that he failed to receive the best legal assistance from the law firm which he discharged when they assigned a 26-year old lawyer whose discussions with the plaintiff fringed on his racial background and spent all this time with the plaintiff to convince him to accept the sum of $80,000, and who further was about to return him to Brazil with an archaic, artificial leg, and without rehabilitative treatment.

It is plaintiff's position that this matter is on the Civil side of the Court and that defendant FROTA is an indispensable party to the action since FROTA's negligence and the defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO's negligence are concurrent causes for the plaintiff's injury and, notwithstanding defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO's constant contention that FROTA should be severed, this would only serve to create a multiplicity of actions and nowhere do I see a motion to sever defendant FROTA OCEANICA BRASILEIRA, S.A. In view of the fact that FROTA IS an indispensable party, this Court would lack jurisdiction and this action should be remanded.

Defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. continues to skirt about defendant FROTA's amenability to service of process in Texas because, notwithstanding Mr. Cichanowicz' latest affidavit and memorandum, not one of the defendants has proven that defendant FROTA OCEANICA BRASILEIRA, S.A. is amenable to service in Texas.

Mr. Cichanowicz cites two cases supporting this position that the joinder of defendant FROTA did not defeat removal. If this Court does such a thing as dismiss against defendant FROTA OCEANICA BRASILEIRA, S.A., it would, of course, be without prejudice and FROTA would be sued again in the State Supreme Court. No matter how the circle turns, plaintiff's entire action should be remanded to the Supreme Court, New York County.

WHEREFORE, it is respectfully requested that plaintiff be granted the relief requested herein, and for such other and further relief as to this Court may seem just and proper.

/s/ KENNETH HELLER

Sworn to before me this
14th day of September, 1976

CLAIRE I. WEINBERG
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires March 30, 1978

AL NO. _____

SUPPLEMENTARY OFFENSE REPORT
GALVESTON POLICE DEPARTMENT

ANT Starkeiser Da Silva Matos Pires | OFFENSE Injured Man INVESTIGATION

Shop Frotaleste, Pier 39 | WHERE COMMITTED 37th Indurtrial

DATE OF ACCURENCE 12/11/75

ails of Offense, Progress of Investigation, etc.) Date 12/11/75, 19__

LISTED BELOW ARE THOSE MEN FROM THE GALVESTON WHARVES WHO WERE EITHER DIRECTLY OR INDIRECTLY INVOLVED IN THE ACCIDENT IN WHICH MR. PIRES WAS INJURED.

1.	Paul Attanasio,	Supt.	2507 Pine, Galveston	7443129
2.	Rudy Reihl	Switchman	4717-5th Hitchock	9353112
3.	L.F. Fox	Switchman	600 19th #1, Galveston	7628869
4.	C.S. Boysen	Foreman	2214 49th, Galveston	7445473
5.	H.K. Evelt	Engineer	1308 Houston, LaMarque	9352297

THESE MEN REFUSED TO GIVE A VOLUNTARY STATEMENT UPON ADVISE OF THEIR COUNSEL.

Jack Rodgers 712
CWED Bill Dang BADGE NO. 417
(INVESTIGATING OFFICER)

CASE DECLARED | INACTIVE (NOT CLEARED) _____
UNFOUNDED _____
CLEARED BY ARREST _____

IS ...ORM TO be used by Detectives and Patrolmen assigned to case:
1. For additional facts, evidence, statements, etc.
2. When significant developments occur.
3. To report progress after seven days and weekly thereafter.
4. When commanding officer requests exact status of case.
When case is closed, this report (with all other materials) must be forwarded to Records Bureau.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

76 Civ. 3050 (L.P.G.)

ORDER TO SHOW CAUSE

Upon the annexed motion and affidavit of RICHARD BETLESKY, associated with the office of KENNETH HELLER, Attorney for the Plaintiff, and the exhibit attached thereto, it is

ORDERED that the defendants, CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A., show cause at a motion term of this Court, to be held in Room 506, United States Court House, Foley Square, New York, New York, on the 3rd day of October, 1976, at 10:30 o'clock, in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made herein to stay the transfer of this case to the United States District Court for the Southern District of Texas pursuant to the Order of Justice Lee Gagliardi, dated October 18, 1976, and to stay the Court from transferring said action pending appeal of the order of Judge Gagliardi.

IT IS FURTHER ORDERED that service of a copy of this order and of the papers upon which the same is granted, on the said defendants, on or before the day of October, 1976, shall

be sufficient service of this order, and in the meantime and until the hearing and determination of this motion and the entry of an order thereon, let all proceedings be stayed and the Clerk of the Court is stayed from transferring the papers pending the determination of this motion.

Dated: New York, New York
October 22, 1976

UNITED STATES DISTRICT JUDGE

TO: CICHANOWICZ & CALLAN
Attorneys for Defendant
FROTA OCEANICA BRASILEIRA, S.A.
80 Broad Street
New York, New York 10004

HENRY W. HERBERT
Attorney for Defendant
CHICAGO, ORCK ISLAND &
PACIFIC R.R. CO.
466 Lexington Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

S. M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

----------x

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD BETLESKY, being duly sworn, deposes and says:

That he is an attorney at law of the State of New York, that he is associated with the law firm of KENNETH HELLER, attorney for the plaintiff herein, and is fully familiar with the facts and proceedings heretofore had herein.

This affidavit is made in support of the instant Order to Show Cause requesting this Honorable Court to stay the transfer of the present action to the Southern District Court of Texas, Galveston Division, pursuant to the Order of the Hon. Judge Gagliardi dated October 18, 1976.

It is respectfully submitted that this application to stay said transfer be granted.

This is an action to recover money damages arising out of an accident that took place on December 11, 1975, when the plaintiff S. M. PIRES, a Brazilian seaman, was struck by a railroad car in Galveston, Texas, resulting in the amputation of one leg and

other serious and permanent disabling injuries. Plaintiffs, commenced this action against the defendants in this Court. Defendant FROTA OCEANICA BRASILEIRA, S.A., moved to dismiss the complaint as to FROTA OCEANICA BRASILEIRA, S.A. pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P., for lack of jurisdiction and for the failure of the complaint to state a claim upon which relief can be granted, or, in the alternative, to transfer this action to the United States District Court for the Southern District of Texas, Galveston Division, pursuant to 28 U.S.C. §1404(a). Defendant CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. ("Rock Island") also moved to transfer the action to Texas pursuant to 28 U.S.C. §1404(a). Plaintiffs S. M. PIRES and VIRGINIA PIRES("Pires") cross-moved to remand this action to the Supreme Court of the State of New York pursuant to 28 U.S.C. §1447(c) or in the alternative to dismiss without prejudice pursuant to Rule 41(a)(2) Fed. R. Civ. P.

By a decision of this Court, dated October 18, 1976, copy of which is annexed hereto, the complaint as to defendant FROTA was dismissed on the grounds of lack of jurisdiction. In addition, the Court also ordered that defendant ROCK ISLAND & PACIFIC R.R. CO. 1404(a) motion to transfer be granted, and the action has been ordered transferred to the United States District Court for the Southern District of Texas, Galveston Division. Plaintiffs' motions were denied in all respects.

Plaintiff is appealing the decision of this Court in all respects. That includes both the dismissal and the transfer of this action to Texas. Pursuant to General Rule 7 of the Rules of this Court, this matter, including all dockets and papers

pertaining thereto will be transferred by the Clerk of this Court to Texas after five (5) days from the docketing of this order. Accordingly, to prevent such a transfer pending the appeal, it is necessary that said transfer be stayed. If a stay is not granted by this Honorable Court, it will only result in a multiplicity of litigation, both here and in Texas, and simultaneous appeals in different jurisdictions will be the end result. By granting the stay, such multiplicity and needless litigation can be avoided, and the Court of Appeals here will have a chance to ultimately decide the respective rights of the respective parties to this suit as it is presently constituted.

The interests of justice require that the stay be granted so that these matters which greatly affect the future life of this unfortunate plaintiff be decided here in their totality, and there should be no transfer of this case until said rights have been ultimately determined by the Court of Appeals.

Again, a stay of said transfer pending the outcome of an appeal from this Honorable Court's order is mandated under the existing circumstances, and your deponent respectfully prays that this requested stay of all proceedings pending an appeal be granted in all respects.

/s/
RICHARD BETLESKY

Sworn to before me this

____ day of October, 1976

CLAIRE I. WEINBERG
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires March 30, 19[illegible]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------x

S. M. PIRES and VIRGINIA PIRES, his wife,

Docket No. 76-8469

Plaintiffs-Appellants,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants-Appellees.

----------x

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' ORDER TO SHOW CAUSE

FACTS

This is an action to recover money damages arising out of an accident that took place on December 11, 1975, when the plaintiff S. M. PIRES, a 22-year old Brazilian seaman, was struck by a railroad car which backed up across a public thoroughfare, resulting in serious and permanent injuries to Mr. Pires, including the amputation of one leg and serious mental repercussions to date. Mr. Pires is presently a New York resident and is receiving extensive rehabilitation

and psychiatric treatment as a result of this tragic occurrence. Plaintiffs commenced this action against the defendant in the United States Court for the Southern District of New York. Defendant FROTA OCEANICA BRASILEIRA, S.A., ("FROTA")moved to dismiss the complaint as to FROTA pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P., for lack of jurisdiction and for the failure of the complaint to state a claim upon which relief can be granted or, in the alternative, to transfer this action to the United States District Court for the Southern District of Texas, Galveston Division, pursuant to 28 U.S.C. §1404(a). Defendant CHICAGO, ROCK ISLAND & PACIFIC R.R.CO. ("ROCK ISLAND")also moved to transfer the action to Texas pursuant to 28 U.S.C. §1404(a). Plaintiffs S. M. PIRES and VIRGINIA PIRES ("PIRES")crossmoved to remand this action to the Supreme Court of the State of New York pursuant to 28 U.S.C.§1447 (c) or,in the alternative, to dismiss without prejudice pursuant to Rule 41(a)(2) Fed. R. Civ. P.

By a decision of this Court, dated October 18, 1976, copy of which is annexed hereto, the complaint as to defendant FROTA was dismissed on the grounds of lack of jurisdiction. In addition, the Court also ordered that defendant ROCK ISLAND 1404(a) motion to transfer be granted, and the action has been ordered transferred to the United States District Court for the Southern District of Texas, Galveston Division.

Plaintiffs' motions were denied in all respects.

Plaintiff is appealing the decision of Judge Gagliardi, dated October 18, 1976, in all respects.

POINT I

THE DISMISSAL AGAINST FROTA WAS CONTRARY TO ACCEPTED MARITIME LAW AND THEREFORE THERE IS JURISDICTION

If there is negligence on the part of an officer or a member of the crew, it makes no difference where the tort is finally consummated, so long as such negligence was in the course of employment. Hopson v. Texaco, Inc., 383 U.S. 262 (1966).

In O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943) the Court, in holding that a seaman could recover under maritime law for a personal injury suffered ashore while in the course of his employment, stated:

> "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters."

See,too, Hopson v. Texaco, Inc., supra; Aquilar v. Standard Oilof New Jersey, 318 U.S. 724 (1942); Kyriakos v. Goulandris, 151 F. 2d 132 (1945); Marceau v. Great Lakes Transit Corp., 146 F. 2d 416 (1945), cert. den. 324 U.S. 872.

Under maritime law a seaman is in the service of his ship even though he is ashore, whenever he is on authorized leave from or is returning to his vessel, Aquilar v. Standard Oil of New Jersey, supra; Hamilton v. Marine Carriers Corp.,

332 F. Supp. 223 (1971).

Mr. Pires, in the instant case, was a seaman and was on authorized leave from his ship at the time of his accident. Therefore, he was in the course of his employment. The fact that this accident occurred inland or ashore does not remove the action from the aegis of accepted maritime law. This is plain from the cases cited above. So long as plaintiff can prove that his injuries were sustained through some negligent act on the part of officers, members of the crew, agents or employees of his employer then the employer can be held liable.

The negligent acts of FROTA are not in issue on this appeal. The issue is rather that the dismissal of plaintiff's action against FROTA before the trier of the facts has had an opportunity to evaluate plaintiff's claims is erroneous and contrary to accepted maritime law. The fact that FROTA's negligence resulted in personal injury to the plaintiff, inland, instead of on navigable waters, does not necessarily make it any less of a maritime action.

Therefore, the District Court erred in dismissing the action against FROTA because it was not a maritime action or because there was no jurisdiction. There is jurisdiction in New York against FROTA and the entire action should be tried in New York against all of the parties to determine plaintiffs' rights.

POINT II

VENUE IS PROPERLY LAID IN THE SOUTHERN DISTRICT OF NEW YORK

The plaintiffs' right to choose the forum in which they wish to litigate is a heavily protected right which will not be disturbed unless the "balance of conveniences" weighs very strongly in favor of other persons. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Lykes Bros. Steamship Co. v. Sugarman, 272 F. 2d 679, 681 (2nd Cir. 1959); Baksay v. Rensellear Polytech Institute, 281 F. Supp. 1007, 1009 (S.D.N.Y. 1968); Foster v. United States Lines Company, 188 F. Supp. 389, 391 (S.D.N.Y. 1960).

The affidavit of RICHARD BETLESKY, copy of which is annexed hereto, sets out in detail all of the reasons that these indigent plaintiffs chose the Southern District of New York, namely: plaintiffs reside in New York, plaintiff S. M. Pires is under continuous medical, rehabilitation and psychiatric care in New York at the present time; plaintiffs' attorney practices in New York and they have no attorney in Texas; the vast majority of relevant medical and psychiatric witnesses reside and practice in New York; Pires has recurrent nightmares about this accident and has a dread of returning to the scene of his tragedy.

In Lykes Bros. Steamship Co. v. Sugarman, supra., the

Court very cogently stated:

> "Our experience teaches that although vitally necessary it is often not easy for a seaman to obtain the counsel and medical support which he trusts; when he has obtained both it is not unnatural that he wishes to utilize them as fully as he can." (272 F. 2d at 681) (emphasis added).

To force this poor, young former seaman to return to Texas, engage an attorney to represent him, interrupt the medical care he is presently receiving and locate new medical, rehabilitative and psychiatric treatment would create irreparable harm.

POINT III

THE ORDER OF JUDGE GAGLIARDI DISMISSING THE COMPLAINT AS TO DEFENDANT FROTA AND TRANSFERRING THE ACTION AS TO THE REMAINING DEFENDANT CHICAGO, ROCK ISLAND & PACIFIC R.R. CO. IS APPEALABLE.

This case involves an action with multiple parties. An action is appealable when an order fully adjudicates the rights and liabilities of one or more but fewer than all of the parties in the action, Dacey v. Florida Bar, Inc. (1969) 414 F.2d 195; Farrell v. Piedmont Aviation, Inc., (1969) 411 F. 2d 812; Eastside Church of Christ v. National Plan, Inc., (1968) 391 F.2d 357; United States Fidelity & Guaranty Co. v. American State Bank (1967), 372 F.2d 1449.

In addition, the Court of Appeals has the power to answer questions fundamental to the further conduct of the

case since if the dismissal is overturned and defendant FROTA is in the case, then the transfer order is invalid as the matter could not be transferred to the District Court in Texas since there could be no jurisdiction over FROTA in Texas.

If the transfer is not stayed pending the appeal from the order, then the plaintiff will suffer irreparable injury in that his case against the remaining defendant will be pending in a foreign jurisdiction and will cause undue hardship to plaintiff. Plaintiff is a New York resident, all the medical witnesses including the therapist, psychiatrist and orthopedists are in New York City. The cost of transporting these expert medical witnesses to a forum in Texas will be impossible for the poor plaintiff, who has had a traumatic amputation of one of his legs, to bear and he will thus be deprived of his full and complete proof in the Texas jurisdiction. This potential factor of irreparable injury supports the basis of appealability, Taylor v. Board of Education of the City School District of New Rochelle, (1961) 288 F. 2d 600.

CONCLUSION

The motion by plaintiff to stay the transfer of this action to the United States District Court for the Southern District of Texas, Galveston Division, pending appeal from

the Order of Judge Gagliardi, dated October 18, 1976, should be granted.

Respectfully submitted,

KENNETH HELLER
Attorney for Plaintiffs-Appellants

by: RICHARD BETLESKY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------x

S. M. PIRES and VIRGINIA PIRES, his wife,

Plaintiff-Appellants,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants-Appellees.

----------x

C.A. Temp No. T-6665

Docket No. 76-8469

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH HELLER, being duly sworn, deposes and says:

I am an attorney at law of the State of New York, County of New York, the attorney for the plaintiffs-appellants herein, and am fully familiar with all the pleadings and proceedings heretofore had herein.

This supplemental affidavit is submitted in support of plaintiffs-appellants' Order to Show Cause and in reply to defendants affidavits in opposition to said motion.

Plaintiff, S. M. PIRES, was 22 years of age, Purtuguese-speaking Brazilian seaman, holding the lowest job in the Engine Room of the ship, with approximately less than one year of experience at sea. He was born in Pernambuco, Brazil, the most depressed area of Brazil where it is estimated that one out of 15 people read and write. His father abandoned his mother and left him an orphan, with a brother and sister, when he was very young and he was taken in hand and sent to school by his father's brother, Carlos Matos

Pires who, in effect, adopted plaintiff.

On December 11, 1975, plaintiff sustained this terrible trauma, amputation of the right leg, in Galveston, Texas, while he was walking down a darkened highway at 37th Street which bisected a railway yard. (Exh I).

Thirty-seventh Street was entirely dark as it bisected railroad yards, and extending into 37th Street was the last car of a train of 13 railroad cars. The car was owned by Defendant, CHICAGO, ROCK ISLAND & PACIFIC R.R CO. ("ROCK ISLAND") and railway (Rock Island, Track #15) right of way was owned by Defendant, ROCK ISLAND.

Unbeknownst to plaintiff who walked past this darkened railroad car, which had no signal lights attached, no brakemen, present, no switchman, nothing to indicate it was anymore than what it appeared -- a stationary object, it suddenly started backwards and hurtled towards him, knocking him down and rolling over him, dragging him back across the road some 100 feet from the shoulder. His companions could then see that this car was coupled to others and that it was part of a train being pushed backwards by a locomotive that was some 400 feet or more from the railroad car (off 37th Street).

Plaintiff's friends ran alongside the train and attracted the attention of the train crew who were gathered near the locomotive, 400 feet from the site of the accident, and who finally stopped the train and ran to the opposite end where they

pulled the plaintiff from under the railroad, ROCK ISLAND car, which had severed his right leg. (Exh II

On December 13, 1975, while plaintiff was highly sedated at the hospital, a Mr. Bunce appeared with a Spanish-speaking person and communicated to plaintiff that he should retain Mr. Bunce to represent him. (Exh III)

Mr. Bunce was a 26-year old attorney, the newest junior, associated with the firm of Royston, Rayzor, Vickery & Williams. Plaintiff indicated to him that he neither knew, nor could he understand what this was about. He was obviously in pain and heavily sedated.

On December 14, 1975, Mr. Bunce reappeared, accompanied by the Master of the vessel who instructed plaintiff-seaman as follows: "You are being left here, we can do nothing for you. You should engage this man who is the ship's attorney and he will represent you." Under those circumstances, plaintiff did so in compliance with the Master's orders. (Exh IV)

The question is, who is Royston, Rayzor, Vickery & Williams, what circumstances brought a large South Texas law firm to request the plaintiff-seaman to give them his case, considering that they never engage personal injury work?

Royston, Rayzor, Vickery & Williams is an influential South Texas law firm who represented, at the time of the accident, the United Kingdom Club and who, I am informed, represented on past occasions the Institute of London Underwriters (the excess insurance carriers for the City of Galveston, owner of the locomotive in this case).

Royston, Rayzor et al. was ordered to go and obtain this case by Mr. Thomas Janis, a Vice President of Lamorte, Burns, & Company, the representative in New York for the United Kingdom Mutual Steam Ship Assurance Association (Bermuda),Ltd. (See excerpt, Page 5 of Interrogatories served on defendant, Exhibit V).

On December 14, 1975, Royston, Rayzor et al. failed to disclose to plaintiff that they had a conflict of interest; that their representation of the plaintiff had an ulterior motive and that they were really there to protect the hospital bill incurred by plaintiff-seaman, some $20,000, for their real client of long-standing, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda), Ltd.

On December 17, 1975, they, Royston, Rayzor, et al., selected the forum of this action without discussing it with plaintiff. They selected the defendant to be the City of Galveston. They failed to ascertain defendant ROCK ISLAND's presence, and they commenced an action in the City of Galveston against the City of Galveston, and asked for a Galveston jury in an action brought by this indigent, latin, plaintiff-seaman.

Mr. Bunce, the attorney assigned to this case, proceeded to allow defendant to take statements from plaintiff's fellow-Brazilian crewmembers who accompanied plaintiff at the time of the accident, then he took statements and the witnesses had given statements to the Police Department of the City of Galveston, all with Spanish interpreters, and none of whom were understood by the Portuguese-speaking witnesses. Mr. Bunce then supplied the witnesses to defendant for depositions, whereupon the witnesses were

cross-examined from all three statements given by them.

On February 11, 1976, defendant served answers to interrogatories on Mr. Bunce and it was then, or prior thereto, that Royston, Rayzor et al. knew that another of their clients was the excess insurance carrier, above the sum of $25,000, the Institute of London Underwriters (Exhibit VI) for defendant CITY OF GALVESTON.

On that date, when Royston, Rayzor, et al. received this information, they should have informed the plaintiff, not only of this fact but should have instructed him to obtain other counsel, since there was a second conflict of interest in that they were now serving two masters as against this unsophisticated plaintiff.

On January 3 or 4, 1976, plaintiff's uncle, Mr. Carlos Matos Pires, arrived in Houston, Texas, and perceiving that there was some doubt in plaintiff's mind of the proper representation, he went with plaintiff and attempted to obtain other counsel. Plaintiff, accompanied by his uncle, met with a lawyer in Houston who contacted the law firm of Royston, Rayzor et al., and plaintiff was instructed to execute another retainer to said counsel (Exhibit VII).

Thereafter, about the middle of February 1976, Mr. Pires, plaintiff-seaman, was called by Mr. Bunce who informed him that in his opinion the matter was worth $80,000 from which approximately $20,000 or $25,000 would be deducted for medical expenses and another $32,000 for Royston, Rayzor, et al. for legal services, and plaintiff-seaman should be pleased with the balance and go home happy since he was a Brazilian.

Plaintiff-seaman was dissatisfied with Mr. Bunce's

advise and he communicated with his uncle, Mr. Carlos Pires.

Sometime towards the end of February 1976, Mr.Carlos Pires called me and told me to go to Galveston, Texas, and investigate his nephew's case. I did so and found that another defendant should have been brought into the action, ROCK ISLAND, and plaintiff-seaman was about to be returned home to Brazil without rehabilitation and without a proper artificial limb; the one issued to him the day before his departure from Galveston in the latter part of February was obsolete.

I informed Mr. Carlos Pires, plaintiff's uncle and plaintiff-seaman himself about what I had been able to find out and plaintiff-seaman then discharged his attorneys, Royston, Rayzor, et al. The letter of discharge reached them by March 1, 1976 (the Post Office informs me that mail was picked up by 9:00 a.m. from the box of Royston, Rayzor, et al.).

On March 1, 1976, at approximately 2:00 p.m., when plaintiff, S. M. Pires, failed to appear for his deposition at the offices of Royston, Rayzor, et al., Mr. Bunce failed to inform defendant that he had been discharged and failed to inform the Court of the discharge so that all proceedings should be suspended pending the discharge. Meanwhile, not informing anyone, Mr. Bunce scheduled another date for the deposition, thereby providing defendant with grounds to dismiss this case with prejudice.

On March 29, 1976, plaintiff-seaman filed a pro se motion to dismiss, <u>without prejudice</u>, the action in Galveston (Exhibit VIII), which was later decided by Judge Ross Sterling on the 26th day of August, 1976, who denied this motion on the

grounds that defendant, CITY OF GALVESTON, having taken three depositions and served interrogatories, had performed legal services there. (Exh. IX).

Judge Ross Sterling did not inquire as to the value of such legal services and make any payment offer, or guarantee of payment as a condition precedent to a dismissal without prejudice. He disregarded plaintiff's desire for a free choice of residence and forum against the one selected merely by the location of the accident and by his former attorneys.

Plaintiff, a Brazilian seaman lives, resides and receives treatment here in New York. He has no funds to attend in Galveston, Texas, and his psychic trauma which created a severe phobia prevents him from travelling to Galveston, Texas. If his action was pending there, he could in no way attend financially or physically.

Plaintiff's wife is in New York.

Plaintiff's infant son is receiving medical treatment for a fractured hip in New York at St. Vincent's Hospital.

There are no eye witnesses in Texas. All the Brazilian eye witnesses call at East Coast Ports on Brazilian ships. The witness closest to plaintiff-seaman, Marcos da Silva, is presently employed aboard a Netumar cargo liner which calls at the East Coast Ports every 30 days and which is named M/S MARCOS SILVA DANTAS.

It is plaintiff-seaman's position that plaintiff is an alien and that New York is plaintiff's "free" choice of forum.

He never had a free choice of attorneys and of forum prior to arriving in New York and, because plaintiff is a seaman, he is to be treated as a ward of admiralty. The contract which

plaintiff-seaman entered into with Royston, Rayzor, et al., which was the basis for the plaintiff's action in Texas and the forum, was made solely for the purpose of enhancing Royston, Rayzor et al's position with their client, The Club, and plaintiff was deprived of his "free" choice of forum until he arrived in New York.

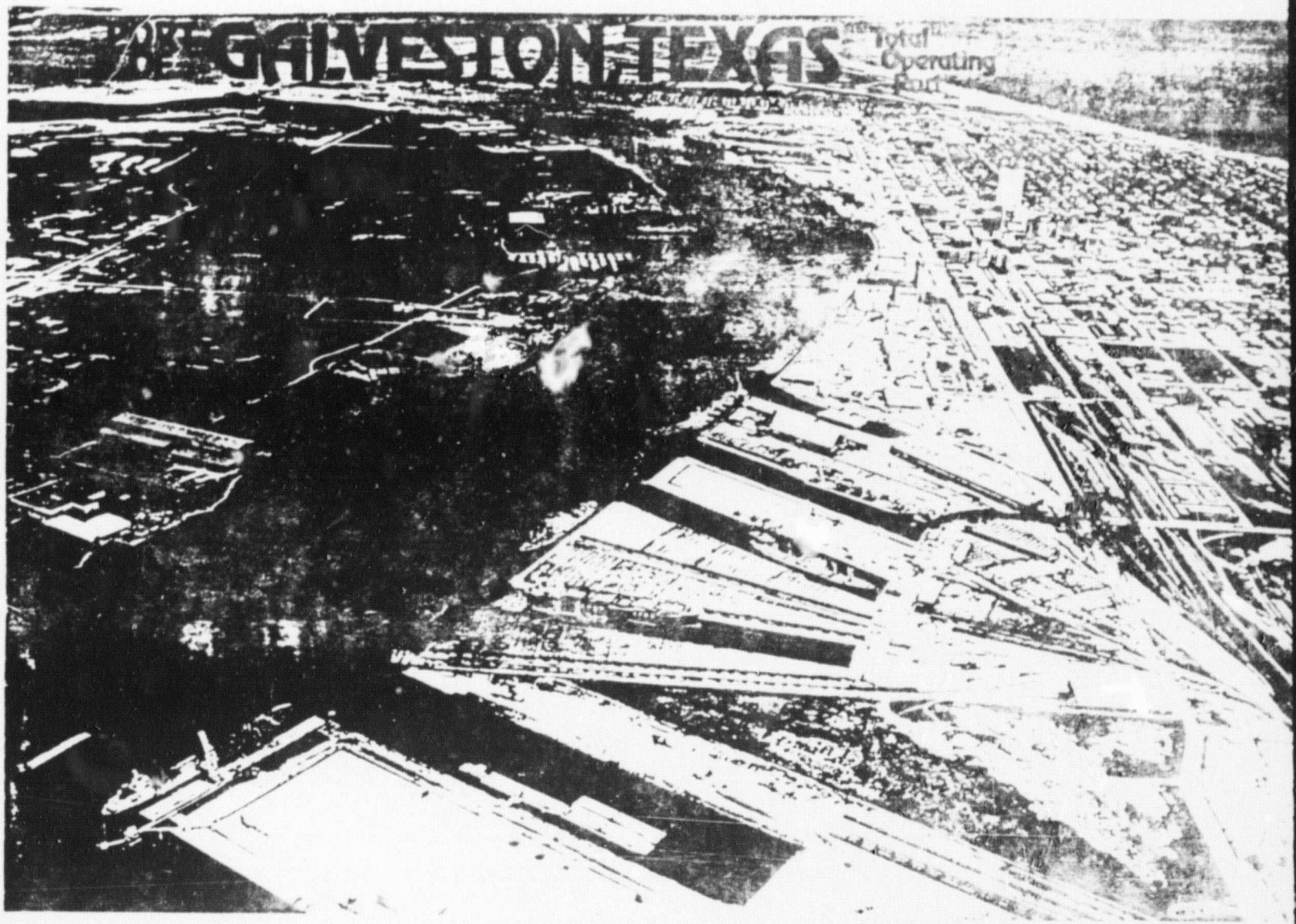
The lower court by its position in dismissing for lack of jurisdiction plaintiff's action against his employer, FROTA, and rejecting plaintiff's version and the manner and happening of the accident and, in turn, severing and transferring his action against ROCK ISLAND Railroad, thereby transferring to a forum which plaintiff-seaman did not freely choose is "compounding" the felony and, in effect, assisting the law firm of Royston, Rayzor, et al. in achieving the goal that they were directed to achieve by their client, The Club, when they were instructed, to go to plaintiff-seaman in the hospital, by Lamorte, Burns & Company and have the plaintiff retain them for the purpose of protecting the hospital lien.

WHEREFORE, it is respectfully requested that this Honorable Court grant plaintiffs-appellants the relief requested and for such other and further relief as to this Court may seem just and proper.

KENNETH HELLER

Sworn to before me this
3rd day of November, 1976

BEST COPY AVAILABLE



Serial No. _____

SUPPLEMENTARY OFFENSE REPORT

CALVESTON POLICE DEPARTMENT

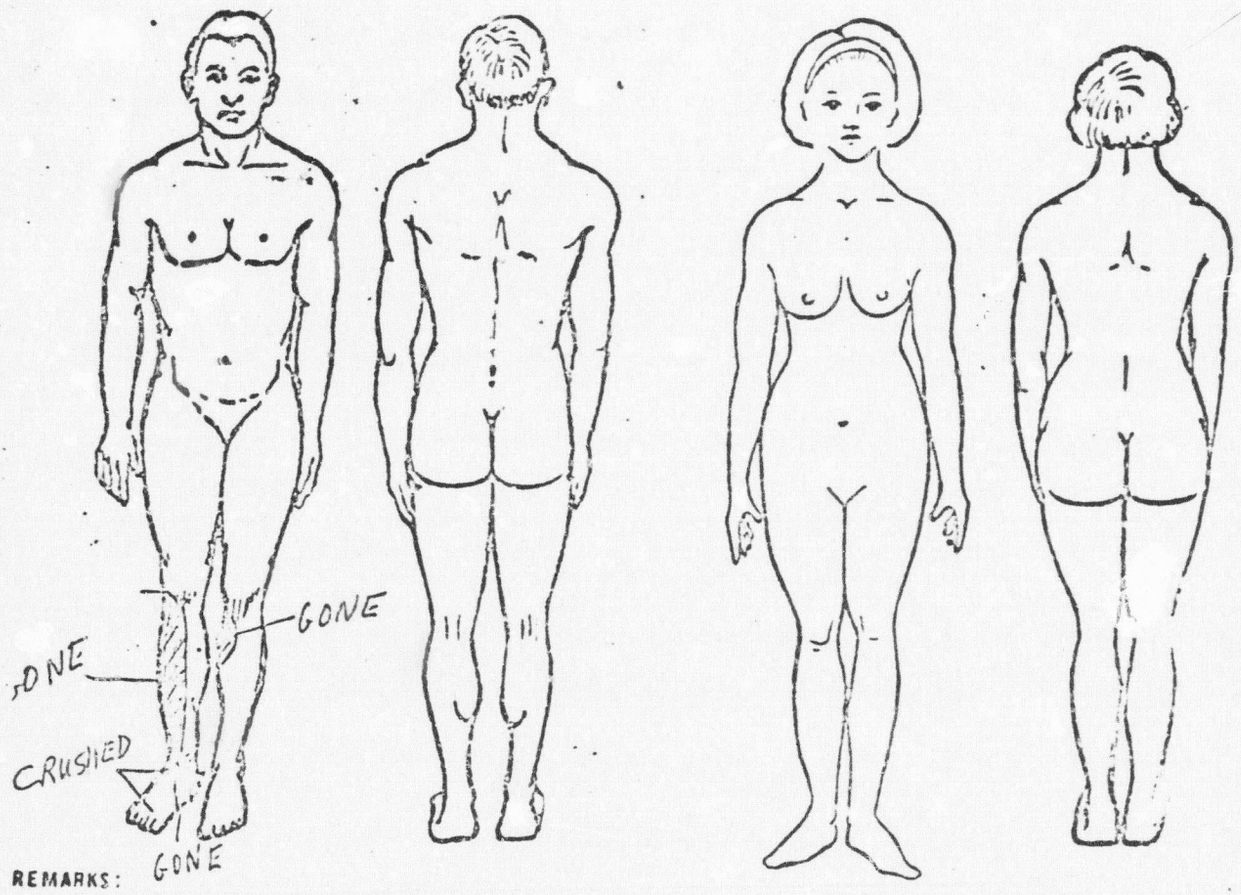
COMPLAINANT STARKEISER DA SILVA OFFENSE INJURED MAN

ADDRESS (SHIP) MATOS PIRES FROTALESTE - PIER 39 WHERE COMMITTED 39th - INDUSTRIAL

DATE OF OCCURRENCE 12-11-75

HOMICIDE ANATOMY REPORT

Date DEC 11 1075



REMARKS:

Charted by Jack Rodgers

SIGNED Jack Rodgers (Investigating Officer)
Bill Dagg

BADGE NO. 212
417

CASE DECLARED INACTIVE (NOT CLEARED)
UNFOUNDED
CLEARED BY ARREST

Exh. II

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STARKEISER da SILVA MATOS PIRES	:	
vs.	:	CIVIL ACTION No. 75-G-173
THE CITY OF GALVESTON, ACTING BY AND THROUGH THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES	:	

AFFIDAVIT

STARKEISER da SILVA MATOS PIRES, being duly sworn, deposes and says:

I am 22 years of age and currently reside in the City, State and County of New York. I am a Brazilian national, and I do not speak the English language, but only Portuguese.

On December 11, 1975, I was employed as a seaman aboard the Brazilian Flag, the "FROTALESTE" and, at approximately 8:40 p.m., while I was walking away from said vessel which was moored at the pier near 37th Street in Galveston, Texas, I sustained severe personal injuries when a railroad train amputated my right leg above the knee joint, and caused soft tissue injury to my left thigh.

I was taken to the University of Texas Medical Branch Hospitals in Galveston, by ambulance, on December 11, 1975 and remained there until February 15, 1976.

1) On my second day in the hospital, December 13, 1975, Mr. Bunce, an attorney, appeared at the hospital with a Spanish-speaking interpreter who did not speak Portuguese. I gathered from the first conversation that Mr. Bunce was a lawyer and that he wanted to handle my injury case. I told him then that I did not ask for him and that I did not know what he was talking about. I was in enormous pain.

2) On the third day following my injury, December 14, 1975, Mr. Bunce again appeared next to my bed with the Captain

of my ship who told me that the ship was sailing then and that, since Mr. Bunce represented the P&I claims for the ship, I would have to contract with him to represent me in my injury case.

I did not speak English; I was alone in a foreign country and I felt deserted. So, I signed the paper he gave me.

On February 14, or 15, 1976, Mr. Bunce called me to his office and told me that, since I did not earn a good salary, only approximately 2,400 dollars (U.S.) per year, I should take 80,000 dollars (U.S.) for the loss of my leg, and since I was a Brazilian and used to living on a small sum of money, I should be happy to accept this sum. I disagreed and left.

On February 25, 1976, I discharged Mr. Bunce for two reasons:

a) He never investigated my case sufficiently to realize that another party existed who was also liable for my injury in addition to the City of Galveston, and

b) His interest on behalf of the Underwriters, the P&I Insurance, conflicted with his representing me. The letter of discharge was mailed on February 26, 1976 and Mr. Bunce received it on March 1, 1976.

On February 28, 1976, Monday, Mr. Bunce apparently did not tell the lawyers for the City of Galveston that he had been discharged. Instead, he scheduled another date for my deposition, and I had left Galveston on February 28, 1976 with no intention ever to return.

On March 12, 1976, since I was not present for depositions, the City of Galveston's lawyers wanted my case dismissed and brought a motion before the Court, in Galveston, to dismiss. Instead of Mr. Bunce protecting my interest, for the third time he failed to protect me. So, my act in discharging him proved to be correct.

I asked the Court in a motion Pro Se to dismiss my case without prejudice and instead of Mr. Bunce agreeing and

protecting my interest, he apparently joined the other side to force me to accept an unacceptable settlement; otherwise, I would lose all my rights.

I am now in New York undergoing rehabilitation at the Rusk Pavilion of the Institute of Rehabilitation Medicine, New York University, where they will fit me with a new type of artificial limb.

I have been told that the Brazilian consulate in Houston has engaged a lawyer for the sole purpose of protecting my rights by getting my case dismissed without prejudice, and again Mr. Bunce has not assisted in getting me what I want but continues to attempt to defeat my wishes.

When my new artificial limb is fitted, I intend to return to Brazil. I want no part of Galveston, Texas, Mr. Bunce, or the Court in Galveston.

STARKEISER da SILVA MATOS PIRES

Sworn to before me this
17 day of May, 1976

RICHARD WEITZNER
Notary Public, State of New York
No. 31-0561234
Qualified in New York County
Commission Expires Mar. 30, 19 78

Certificate of Interpreter

I, MARIA DOLORES GARCIA, certify that the within affidavit was executed in my presence by Mr. P[illegible], and I correctly and accurately interpreted the entire document from the English language into the Portuguese language, my mother tongue, and Mr. Pires acknowledged that he fully understood its contents.

Interpreter

FORM OF CONTRACT

I, the undersigned, hereby employ Royston, Rayzor, Cook & Vickery (1)
of Houston, Texas, to represent me ~~(us)~~ as my ~~(our)~~ attorneys in the
prosecution of any and all claims or causes of action I ~~(we)~~ may have
on account of injuries sustained or losses suffered on or about the
15th day of December, 1975, and complications resulting
therefrom. These claims or causes of action are against
the railroad at 37th Street at Galveston, Texas
which injured me

because of the injuries suffered by me when a
railroad car struck me and resulted in the amputation
of my right leg

and I ~~(we)~~ hereby authorize and empower my ~~(our)~~ said attorneys to act as my ~~(our)~~ negotiator, to file pleadings and appear in Courts of Law in my (our) behalf, to prosecute same to settlement or final judgment and to perform any and all functions which to ~~them~~ him may seem reasonably necessary in the prosecution of my ~~(our)~~ claims or causes of action in the preservation of my ~~(our)~~ rights.

In consideration of the said services rendered and to be rendered by my ~~(our)~~ said attorneys in the prosecution of my ~~(our)~~ claims or causes of action, I ~~(we)~~ hereby set over and assign to my ~~(our)~~ said attorneys as an assignment with an undivided interest in said claims or causes of action as follows:

33 1/3 percent interest if settlement is made before suit is filed thereon; and,

40 percent interest if collection or settlement is made after suit is filed; and,

40 percent interest if the suit is tried and judgment entered thereon, and then same is appealed to the appellate courts.

It is further understood and agreed that if my ~~(our)~~ attorneys should be unable to recover anything, either by settlement or trial, I ~~(we)~~ shall owe ~~him~~ them nothing as a fee. No settlement of my ~~(our)~~ claims or causes of action shall be made without my ~~(our)~~ full knowledge and approval and my ~~(our)~~ said attorneys shall keep me ~~(us)~~ informed of developments in the prosecution of such claims or causes of action. It is distinctly understood that no settlement nor offer of settlement shall be made by me ~~(us)~~ without the expressed consent of my ~~(our)~~ said attorneys.

It is agreed that costs of court and reasonable expenditures made by my ~~(our)~~ attorneys in the handling of my ~~(our)~~ claims or causes of action shall be refunded to ~~him~~ them from my ~~(our)~~ portion of said recovery or settlement. I also agree and understand that the owners of the FCC ALESTE or their insurance carriers shall have paid the costs of medical expenses and others expenses advanced or monies paid to me.

IN WITNESS WHEREOF, I, ~~(we)~~, hereunto affix my ~~(our)~~ signature this 15th day of December, 1975.

CARLOS PIRES

I have had this read to me and I fully understand it. ~~Carlos Pereira~~

translated for me.

STHREESER DA SILVA

witnessed by

ACCEPTED:

For Royston, Rayzor, Cook & Vickery

by Robert E. Bunce

December 15 1975

Exh. IV

CARLOS PIRES

Lamorte, Burns & Co., Inc.

Suite No. 3147
One World Trade Center
New York, N. Y. 10048

Telex WU-12-5561 ITT-421478 RCA-235594
Telephone (212) 432-0400 Cable Address LABURNSHIP

Correspondents For:
The Britannia Steam Ship Insurance Association Ltd.
International Mutual Strike Assurance Company (Bermuda) Ltd.
The London Steam-Ship Owners' Mutual Insurance Association Ltd.
Newcastle Protection and Indemnity Association
The North of England Protecting and Indemnity Association Ltd.
The Oceanus Mutual Underwriting Association Ltd.
The Oceanus Mutual Underwriting Association (Bermuda) Ltd.
The Shipowners' Mutual Strike Insurance Association (Bermuda) Ltd.
The Standard Steamship Owners' Protection and Indemnity Association Ltd.
The Standard Steamship Owners' Protection and Indemnity Ass'n (Bermuda) Ltd.
The Steamship Mutual Underwriting Association Ltd.
The Sunderland Steamship Protecting and Indemnity Association
The United Kingdom Mutual Steam Ship Assurance Association Ltd.
The United Kingdom Mutual Steam Ship Assurance Association (Bermuda), Ltd.

Your Ref

Our Ref TNJ/epr

May 26, 1976

Kenneth Heller, Esq.
277 Broadway
New York, N.Y. 10007

Exh. W

ANSWER: Yes. The insurer is the Institute of London Underwriters, and the assured is the Board of Trustees of the Galveston Wharves and/or the City of Galveston. The policy limits are US $2,000,000.00 any one accident excess of US $25,000.00 any one accident. The policy covers third party bodily injury and property damage, but excludes employer's liability.

21. State the names and addresses and telephone numbers of all expert witnesses defendant intends to call at trial in this cause and state the subject matter on which such experts are expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

ANSWER: Unknown at this time.

22. State the nature of defendant or its employees activity in connection with the movement of ROCK ISLAND HOPPER, railroad car No. 161,529, on December 11, 1975, at approximately 8:40 p.m.

ANSWER: Switching movement.

23. State the name, address, and telephone number of all of defendant's railroad employees or other employees who have knowledge regarding the incident made the basis of plaintiff's suit and who were working for defendant on the night of December 11, 1975.

ANSWER: At this time, the employees include:
Paul Attanasio, 2507 Pine, Galveston - 744-3129
Rudy Riehl, 4717 5th, Hitchcock - 935-3112
L. F. Fox, 600 19th, No. 1, Galveston - 762-8869
C. S. Boysen, 2114 49th, Galveston - 744-5423
H. K. Evalt, 1308 Houston, LaMarque - 935-2297
Charles Nallie (address to be furnished)

24. State whether or not defendant or defendant's attorneys or agents have interviewed Paul Attanasio, Rudy Reihl, L. F. Fox, C. S. Boysen and/or H. K. Evalt.

ANSWER: Yes.

25. State whether or not defendant or defendant's attorneys or agents have statements from Paul Attanasio, Rudy Reihl, L. F. Fox, C. S. Boysen and/or H. K. Evalt.

ANSWER: Defendant has statements from Rudy Riehl and C. S. Boysen

James L. Anthony

JAMES L. ANTHONY
808 Sealy & Smith Professional Building
P. O. Box 629, Galveston, Texas 77553
Attorney in Charge for Defendant,
City of Galveston, acting by and th
its duly constituted and appointed Bo d
of Trustees of the Galveston Wharv

LAW OFFICES
McLEOD ALEXANDER, POWEL & APFFEL, P.C.
808 TEXAS & SMITH PROFESSIONAL BUILDING
700 UNIVERSITY BOULEVARD
GALVESTON, TEXAS 77550
xxxxx 77553

V. W. McLEOD
ROBERT W. ALEXANDER
BENJAMIN R. POWEL
ERVIN A. APFFEL, JR.
JAMES L. ANTHONY
ROBERT A. PARMELEE
C. MICHAEL DAVIS
FREDRICK J. BRADFORD

AREA CODE 713
763-2431
P. O. BOX 629

February 11, 1976

Re: CA No. 75-G-173
Starkeiser Da Silva Matos Pires vs. The City of Galveston, acting by and through the Board of Trustees of the Galveston Wharves
In the USDC, S/D of Texas, Galveston Division

Noted: B W P D L Su K A
To: B W P D L Su K A File No.
FEB 12 1976
File No. 7331-241

Mrs. Emma L. Yon
Deputy District Clerk
United States District Court
Southern District of Texas
Galveston Division
U. S. Postoffice Building
Galveston, Texas 77550

Dear Mrs. Yon:

I enclose for filing in the above cause duplicate Answers of Defendant to Plaintiff's Interrogatories, a copy of which has been furnished to plaintiff's counsel.

Very truly yours,

James L. Anthony

JLA:cmm
Encls.

cc: Mr. Robert S. DeLange — CERTIFIED - RRR
Messrs. Royston, Rayzor, Cook & Vickery
Attorneys at Law
205 Cotton Exchange Building
Galveston, Texas 77550
(w/copy of encls.)

Exh VI

POWER OF ATTORNEY

I, the undersigned, hereinow employ Royston, Rayzor, Cook & Vickery, attorneys at law, to represent me as my attorneys in the prosecution of any and all claims or causes of action I may have by reasons of injuries sustained or losses suffered on or about the 11th day of December, 1975, and complications resulting therefrom. These claims or causes of action are against the railroad at 37th Street at Galveston, Texas, which injured me because of the injuries suffered by me when a railroad car struck me and resulted in the amputation of my right leg and I hereinow authorize and empower my said attorneys to act as my negotiator, to file pleadings and appear in Courts of Law in my behalf, to prosecute same to settlement or final judgment and to perform any and all functions which to them may seem reasonably necessary in the prosecution of my claims or causes of action in the preservation of my rights.

In consideration of the said services rendered and to be rendered by my said attorneys in the prosecution of my claims or causes of action, I hereinow set over and assign to my said attorneys as an assignment with an undivided interest in said claims or causes of action as follows:

33 1/3 percent interest if settlement is made before suit is filed thereon; and,

40 percent interest if collection or settlement is made after suit is filed; and,

50 percent interest if the suit is tried and judgment entered thereon; and then same is appealed to the appellate courts.

It is further understood and agreed that if my attorneys should be unable to recover anything, either by settlement or trial, I shall owe them nothing as a fee. No settlement of my claims or causes of action shall be made without my full knowledge and approval and my said attorneys shall keep me informed of developments in the prosecution of such claims or causes of action. It is distinctly understood that no settlement nor offer of settlement shall be made by me without the expressed consent of my said attorneys.

It is agreed that costs of court and reasonable expenditures made by my attorneys in the handling of my claims or causes of action shall be refunded to them from my portion of said recovery or settlement. I also agree and understand that the owners of the PROTALESTE or their insurance Carriers shall be repaid the costs of medical expenses and other expenses advanced or monies paid to me.

IN WITNESS WHEREOF, I, hereunto affix my signature this 22nd day of January, 1976.

I have had this read to me and I fully understand it. Carlos Pires translated for me.

Starkeiser da Silva Matos Pires
Starkeiser Da Silva Matos Pires

Witnessed By: Carlos Pires
Carlos Pires

ACCEPTED:

Royston, Rayzor, Cook & Vickery

By: Robert J. De Lange Exh. VII

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STARKEISER DA SILVA MATOS PIRES,

Plaintiff,

vs.

THE CITY OF GALVESTON, ACTING BY AND THROUGH THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES,

C.A. 75-G-173

Defendant.

MOTION FOR ORDER DISCONTINUING ACTION

COMES NOW plaintiff, pro se, and files this, his motion for an order discontinuing the above-entitled and enumerated cause, and in support thereof, respectfully shows the Court as follows:

(1) Plaintiff is an indigent Brazilian Merchant Seaman. Plaintiff was never a resident of Galveston, Texas, but merely an in-patient at the John Sealy Hospital after having been brought there as an emergency patient after suffering, among other numerous serious injuries, a traumatic amputation of his right leg on 37th Street, Galveston, by a railroad train.

Plaintiff is now presently residing in the City and State of New York.

(2) Plaintiff discharged his former Attorneys, Royston, Rayzor, Cook & Vickery on February 25, 1976 and a copy of the letter of discharge is annexed hereto as Exhibit 1. Said letter was received by Messrs Royston, Rayzor, Cook & Vickery, plaintiff's former attorneys on February 28, 1976, A.M. Plaintiff was discharged from the John Sealy Hospital on February 25, 1976 and immediately departed the jurisdiction. Plaintiff has no funds to return, and has no intention, even if funds were provided, to return to Galveston.

Annexed hereto as Exhibit 11 is a copy of plaintiff's letter, dated March 10, 1976, to the Hon. James Noel, Judge United States District Court, Galveston, Texas to which plaintiff attached a copy of his letter of discharge of his former attorneys, Royston, Rayzor, Cook & Vickery.

(3) Plaintiff wishes to discontinue this action commenced by his former attorneys, Royston, Rayzor, Cook & Vickery without prejudice.

(4) Plaintiff has applied for a course of rehabilitation at the Institute of Rehabilitation Medicine, 400 East 34th Street New York, New York, and will be under extensive course of treatment and, thereafter, will return to Brazil.

WHEREFORE, premises considered, plaintiff, pro se, respectfully prays that an Order be entered herein discontinuing this complaint without prejudice and without costs.

Plaintiff, pro se

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

STARKEISER DA SILVA MATOS PIRES, being duly sworn, deposes and says that he is the plaintiff herein; that he has read the foregoing motion and knows the contents thereof; and that the allegations therein contained are true.

Starkeiser da Silva Matos Pires
Plaintiff

SUBSCRIBED AND SWORN TO BEFORE ME THIS 20 DAY OF MARCH, 1976.

BERNARD GROSS
Notary Public, State of New York
No. 31-0247[illegible]
Qualified in [illegible] County
Commission Expires [illegible], 1976

NOTARY PUBLIC, STATE OF N.Y.

S I R S :

PLEASE TAKE NOTICE that the foregoing motion will be presented for consideration on the 29th day of March, 1976, at 9:00 A.M.,at the offices of the Clerk, Post Office Building, Galveston, Texas.

Starkeiser da Silva Matos Pires
Plaintiff, pro se
c/o Mr. Lerner
Omnium Agencies, Inc.
42 Broadway
New York, New York

TO:
V. Bailey Thomas, Clerk
United States District Court
Post Office Building
Galveston, Texas

Mr. Robert S. DeLange
Boyston, Rayzor, Cook & Vickery
205 Cotton Exchange Bldg.
Galveston, Texas 77550

Mr. James L. Anthony
McLeod, Alexander, Powel & Apffel, Inc.
P. O. Box 629
Galveston, Texas 77550

STARKEISER DA SILVA MATOS PIRES vs. THE CITY OF GALVESTON, ACTING BY AND THROUGH THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES

12/18/75: Summons issued to Defendant thru Mayor R. A. Apffel and thru Mr. C. S. Devoy, Executive Director of Calveston Wharves.

3. 12/30/75: Defendant's ORIGINAL ANSWER, filed.

4. 1/5/76: Marshal's Return on Summons issued to the Deft. thru Mr. R. A. Apffel, the Mayor of Calveston, filed; executed on 12/22/75.

5. 1/5/76: Marshal's Return on Summons issued to the Deft. thru Mr. C. S. Devoy, the Executive Director of the Galveston Wharves, filed; executed on 12/22/75.

6. 1/22/76: Plaintiff's INTERROGATORIES, filed.

7. 2/12/76: Defendant's ANSWER TO Plaintiff's Interrogatories, filed.

8. 2/26/76: Plaintiff's REQUEST FOR PRODUCTION OF DOCUMENTS, filed.

Exh IX

Exh IX

ENAUDIN
...IAMS, JR.
...TTERSON, JR.
...LOR
...ON
...VIS
...NNEDY
...UYKENDALL
...LCOMBE
...LANGE
...INSEN
...RSON
W. ROBINS BRICE
WARREN G. CRAIG
JAMES PATRICK COONEY
ROBERT E. DUNCE
BRADLEY A. JACKSON
SAMUEL B. KENT

ROYSTON, RAYZOR, VICKERY & WILLIAMS
ATTORNEYS AT LAW
205 COTTON EXCHANGE BUILDING
GALVESTON, TEXAS 77550
AREA CODE 713 763-1623
CABLEGRAM "ROYSTON"
TELEX NO 765-449

M. L. COOK
C. A. BROWN
OF COUNSEL

HOUSTON OFFICE
SUITE 3710
ONE SHELL PLAZA
HOUSTON, TEXAS 77002
AREA CODE 713 224-8380
CABLEGRAM "HOUPORT"
TELEX NO 762-648

March 26, 1976

Mr. Kenneth Heller
277 Broadway, Room 1408
New York, New York 10007

Re: C. A. No. 75-G-173
Starkeiser Da Silva Matos Pires vs.
The City of Galveston Acting By and
Through the Board of Trustees of the
Galveston Wharves - Our File 7238

Dear Mr. Heller:

It is my understanding that you now represent Mr. Pires, and in that connection, I am enclosing a statement for deposition expense submitted by Court Report Mary Diconi for five depositions taken in the above captioned matter. I ask that you handle this statement directly with Ms. Diconi. We will be happy to turn over our copies of these depositions to you once it has been verified that you have paid Ms. Diconi's statement.

Sincerely,

Royston, Rayzor, Vickery & Williams

RSD/db
*Enclosure

RECEIVED
MAR 29 19...
KE...

mary diconi • official court reporter

301 galvestor county courtho[illegible] galveston, texas
80 2-8621 • ext. 278 77550

To: ROYSTON, RAYZOR, VICKERY & WILLIAMS
ATTN: MR. ROBERT E. BUNCE, ESQ.
205 COTTON EXCHANGE BLDG.
GALVESTON, TEXAS 77550

Date: MARCH 24, 1976

Re: CIVIL ACTION NO. G75-G-173
STARKEISER DA SILVA MATOS -VS-
THE GALVESTON WHARVES

Job No. 75-272

ORIGINAL DEPOSITION OF ANGELO TAMAGNY CASTANHO FILHO.....	$ 171.50 *
ONE COPY OF DEPOSITION OF ANGELO TAMAGNY CASTANHO FILHO...	94.80
ORIGINAL DEPOSITION OF VALMOR JOSE MACHADO.....	108.50 *
ONE COPY OF DEPOSITION OF VALMOR JOSE MACHADO.....	61.45
ORIGINAL DEPOSITION OF MARCOS AMARO DA SILVA.....	51.50 *
ONE COPY OF DEPOSITION OF MARCOS AMARO DA SILVA.....	20.80
ONE COPY OF DEPOSITION OF MILTON CARDOSO DA SILVA.....	13.80
ONE COPY OF DEPOSITION OF JOSE PINTO RAMALHO.....	13.00
TOTAL.....	$ 544.35

THANK YOU

Taxable Cost: $331.50 *

Employer I. D. No. 746031978

Exh IX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

S. M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R. R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants.

- -x

76 Civ. 3050

MEMORANDUM DECISION

GAGLIARDI, D. J.

Defendant Frota Oceanica Brasileira, S.A. ("Frota") moves to dismiss the complaint as to Frota pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P., for lack of jurisdiction and for the failure of the complaint to state a claim upon which relief can be granted, or, in the alternative, to transfer this action to the United States District Court for the Southern District of Texas, Galveston Division pursuant to 28 U.S.C. §1404(a). Defendant Chicago, Rock Island & Pacific R.R. Co. ("Rock Island") also moves to transfer the action to Texas pursuant to 28 U.S.C. §1404(a). Plaintiffs S.M. Pires and Virginia Pires ("Pires") cross-move to remand this action to the Supreme Court of the State of New York pursuant to 28 U.S.C. §1447(c) or in

the alternative to dismiss without prejudice pursuant to Rule 41(a)(2) Fed. R. Civ. P.

Plaintiffs, Brazilian citizens, commenced this action against Rock Island, a Delaware corporation with offices in New York, on June 17, 1976 in Supreme Court, New York County to recover damages for injuries allegedly sustained by plaintiff S.M. Fires in Galveston, Texas. That action was properly removed to this court pursuant to 28 U.S.C. §1441(a) on diversity grounds, 28 U.S.C. §1332(a)(2). Plaintiffs then amended their complaint and added Frota as a party defendant by asserting a "General Maritime Claim" against that party.

12(b)(1) Motion to Dismiss

The court grants defendant Frota's 12(b)(1) motion and dismisses the claim against Frota for lack of jurisdiction. Suits in maritime law may be brought either on the admiralty side, 28 U.S.C. §1333(1), or on common law maritime jurisdiction based upon diversity of citizenship, 28 U.S.C. §1332(a)(2). Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-11 (1953). The pleadings in this case do not allege a claim of admiralty jurisdiction. Admiralty jurisdiction over tort claims can only be invoked when: (1) the locality where the alleged tortious wrong occurred was on navigable waters, and (2) the wrong bears a significant relationship to traditional maritime activity

involving navigation or commerce on navigable waters. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 256, 268 (1972); see 7A J. Moore, Federal Practice, Admiralty ¶.325 (2d ed. 1976). Arguably, the alleged tort of failure to instruct on a safe means of egress, having occurred on the defendant's ship, meets the locality requirement for jurisdiction. However, being hit by a railroad car while crossing freight tracks on the way to the city of Galveston has no significant relationship to maritime activity. See Gowdy v. United States, 412 F.2d 525 (6th Cir.), cert. denied, 396 U.S. 960 (1969); see also Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973).

As a result, plaintiffs' maritime claim against Frota can only be brought under common law diversity jurisdiction. However, since plaintiffs and defendant Frota are aliens, the claim does not satisfy the diversity requirements of 28 U.S.C. §1332. Trinanes v. Schulte, 311 F.Supp. 812, 813-14 (S.D.N.Y. 1970); Karakatsanis v. Conquestador CIA. Nav., S.A., 247 F. Supp. 423, 426 (S.D.N.Y. 1965). Therefore, the claim against defendant Frota must be dismissed.

§1404 Transfer to Texas

The court retains jurisdiction over the suit between Pires and Rock Island, diversity being judged as

of the date of removal. See Salem Trust Co. v. Manufacturers' Finance Co., 264 U.S. 182, 189-90 (1924); Kerr v. Compagnie de Ultramar, 250 F.2d 860, 862-63 (2d Cir. 1958). The court in its discretion elects to transfer this action to the Southern District of Texas, Galveston Division. United States v. General Motors Corp., 183 F. Supp. 858, 860 (S.D.N.Y. 1960). The court finds that by the transfer the convenience of parties and witnesses and the interest of justice would be best served. Schneider v. Sears, 265 F. Supp. 257, 261 (S.D.N.Y. 1967).

Plaintiff S.M. Pires was injured when he was hit by a freight car in Galveston, Texas. Plaintiff has already brought an action in the Southern District of Texas against the Galveston Wharves to recover damages for injuries sustained in this same accident. Civ. No. 75-G-173 (Judge Ross N. Sterling). The parties are engaged in discovery in that case. There is a strong policy favoring the litigation of related claims in the same tribunal. Schneider v. Sears, supra at 266-67. The present action before this court could have been brought originally in the Southern District of Texas. See Hoffman v. Blaski, 363 U.S. 335 (1960). The majority of the witnesses are in Texas. The fact that plaintiff has received medical attention in New York does not require the action to be maintained here since such treatment is contained in medical records which will be admissible in the transferee

court. As a result, the court in its discretion transfers the action to the United States District Court for the Southern District of Texas, Galveston Division.

In summary, therefore, defendant Frota's Rule 12(b)(1) motion to dismiss is granted and the court does not need to reach the 12(b)(6) motion or defendant Frota's §1404(a) motion to transfer. Defendant Rock Island's §1404(a) motion to transfer is granted; and plaintiffs' motions are denied in all respects.

So Ordered.

U.S.D.J.

Dated: New York, New York
October 18, 1976.

ORIGINAL

AO Form No. 82-Rev.
Form approved by
Comp. Gen., U. S.
June 26, 1953.

RECEIPT FOR PAYMENT

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

OFFICE OF THE CLERK — NEW YORK CITY

RECEIVED FROM Kenneth Heller DATE 10/26/76

Docket No.	(Pl.)	(Def.)
76 Civ. 3050 (LPG)	S.M.T.U. Union — Chicago Bookbinders & Ruggedo PCC Trans.	

ACCOUNT	AMOUNT	ACCOUNT	AMOUNT
Clerks Fees Appeal	1 50	Registry Cash Bail / Tender — ACCT. NO. 1	
Bankruptcy Filing Fee		Seaman's Wages — ACCT. NO. 2	
Referee's Sal. and Exp. Fund		Unpaid Dividends in Bankruptcy — ACCT. NO. 3	
Miscel. Earnings Copy			
Certificate		Other Moneys	
Search		Costs	
		Fine	
Nat'zn Fees Pet. Nos.			
Decl. Nos.			

Total ► 5.00

DEPUTY CLERK A Harbison

Cash ☑ Check ☐ MONEY ORDER ☐

077769

★ U.S. GPO : 1975-603-671

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs-Appellants,

-against-

CHICAGO, ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants-Respondents.

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76 Civ. 3050 (L.P.G.)

NOTICE OF APPEAL

S I R S :

PLEASE TAKE NOTICE that the plaintiffs, S. M. PIRES and VIRGINIA PIRES, his wife, hereby appeal to the United States Court of Appeals for the Second Circuit from a Memorandum Decision of the Hon. Judge L.P. CAGLIARDI, dated October 18, 1976, and from each and every part thereof.

Dated: New York, New York
October 22, 1976

Yours, etc.,

KENNETH HELLER
Attorney for Plaintiffs-Appellants
Office & P.O. Address
277 Broadway
New York, New York 10007
(212) 962-6085

TO: CICHANOWICZ & CALLAN, ESQS.
Attorneys for Defendant-Respondent
FROTA OCEANICA BRASILEIRA, S.A.
80 Broad Street
New York, New York 10004

HENRY W. HERBERT
Attorney for Defendant-Respondent
CHICAGO, ROCK ISLAND & PACIFIC R.R. CO.
465 Lexington Ave
New York, New York 10017

Order attached re filed Copies

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
KENNETH HELLER
Attorney for

Office and Post Office Address
277 Broadway
NEW YORK, N. Y. 10007

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,
KENNETH HELLER
Attorney for

Office and Post Office Address
277 Broadway
NEW YORK, N. Y. 10007

To

Index No. 76 Civ. 3059 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. M. PIRES, and VIRGINIA PIRES, his wife,

Plaintiffs-Appellants,

-against-

CHICAGO ROCK ISLAND & PACIFIC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants-Respondents

NOTICE OF APPEAL

KENNETH HELLER
Attorney for Plaintiffs-Appellants
Office and Post Office Address, Telephone
277 Broadway
NEW YORK, N. Y. 10007
(212) WOrth 2-6085

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

TO BE ARGUED BY
KENNETH HELLER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. T-6665

---

76 Civil 3050

S. M. PIRES and VIRGINIA PIRES, his wife

Plaintiff-Appellant,

-against-

CHICAGO, ROCK ISLAND AND PACIFC R.R. CO., and FROTA OCEANICA BRASILEIRA, S.A.,

Defendants-Appellees.

On Appeal From The United States District Court for the Southern District of N.Y.

APPENDIX FOR PLAINTIFF-APPELLANT

KENNETH HELLER, ESQ.
Attorney for Plaintiff-Appellant
277 Broadway
New York, New York 10007
WO 2-6085